# In the Supreme Court of the United States.

OCTOBER TERM, 1909.

CHARLES R. HEIKE, PLAINTIFF IN ERROR,
*v.*
THE UNITED STATES.

*ON ALLOWANCE OF WRIT OF ERROR AND STAY OF PROCEEDINGS BY MR. JUSTICE LURTON TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

**MOTION TO VACATE ORDER ALLOWING WRIT OF ERROR AND TO VACATE SUPERSEDEAS AND STAY OF PROCEEDINGS.**

Comes now the Solicitor-General on behalf of the United States, and moves the court to vacate and set aside the order dated February 25, 1910, by Mr. Justice Lurton, allowing a writ of error to the Circuit Court of the United States for the Southern District of New York, and a further order staying proceedings in said court.

As the basis for said motion the Solicitor-General submits to the court herewith a notice of motion and an affidavit (Appendix A) signed by Mr. Henry L. Stimson, special assistant to the Attorney-General and in charge of the prosecution of the plaintiff in

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error herein, who stands indicted in said Circuit Court for violations of the customs law in connection with the fraudulent importation of dutiable sugar and also, in conjunction with other persons, for a conspiracy under section 5440, Revised Statutes, to defraud the United States and to commit offenses under the customs law.

To this indictment the defendant filed a special plea claiming immunity under the act of February 25, 1903 (32 Stat., 904, ch. 755), as amended by the act of June 30, 1906 (34 Stat., 798), on the ground that he had previously testified before grand juries in investigations of alleged violations of the Sherman Anti-trust law. To this plea the Government filed a replication traversing the plea. The issue thus raised was brought on for trial before Judge Martin and a jury in said Circuit Court on February 10, 1910.

Upon the conclusion of the taking of testimony the defendant, Heike, moved for a direction of verdict upon the plea and the Government moved for a direction of verdict in favor of the United States. On February 14 the court directed a verdict in favor of the Government on the plea. A copy of the opinion of the court thereon is printed as Appendix B herewith.

*A plea of not guilty was thereupon entered by the defendant and received by the court and the case was set for trial on Tuesday next, March 1,* as appears from the docket entries and from extracts of the minutes as set forth in Appendix C. No objection

was made by opposing counsel to the order of the court setting the case for trial on that day.

The Solicitor-General submits to the court that this writ of error has been sued out for the purpose of delaying the trial of the plaintiff in error, and to obtain a severance as to him from trial with the other defendants jointly indicted with him. As will appear from the affidavit of Mr. Stimson (Appendix A), in view of the highly congested condition of the calendar of the Circuit Court in the Southern District of New York, it will be impossible to try the case, if not now proceeded with, until the fall of this year.

*There being no final judgment of the Circuit Court, there is no right to review by this court in the present status of the case.* It is not necessary to cite authorities on this point. The writ of error therefore would be subject to dismissal on motion, after due notice, under the rule. In the meantime, however, if the stay of proceedings allowed herein be permitted to stand, counsel for the plaintiff in error will have succeeded, by indirection, in securing a delay in the trial of the indictment. Furthermore, a large number of witnesses have been subpœnaed for the trial set for Tuesday next, and if the case is not then proceeded with, the Government, the other defendants, and the witnesses will be subjected to great inconvenience and unnecessary expense.

That counsel knew that the action of Judge Martin in sustaining the Government's motion to direct a verdict on the immunity plea is not reviewable at the

present stage of the case by this court is manifest from the following statement of Mr. Stanchfield, counsel for the plaintiff in error, made upon the argument in the court below on said motion:

> Mr. STANCHFIELD. Whether or no your honor is familiar with the fact I am not advised, but subsequent to the decision in the case of *United States* v. *Armour*, Congress passed a law conferring upon the Government the right of appeal in cases analogous to the situation that here exists. That is, if your honor were disposed to uphold our contention and direct a verdict in favor of the defendant upon this proceeding the United States Government have a right to review that decision. If, upon the other hand, you should decline to direct a verdict in our behalf and should direct one in favor of the Government, why then there is left to us under that statute, for reasons I do not understand, no right of appeal. In other words, we would be relegated to a trial upon the merits, and the only way in which we could review the question at all would be in the event of disaster upon the trial and in the record going up from that result probably would be incorporated as a part of the record the proceedings that had taken place upon the trial of this preliminary plea.

The only cases in which this court has jurisdiction to review a criminal case on writ of error direct to the Circuit Court *after final judgment of conviction* are those set forth in section 5 of the Circuit Court of Appeals act, such as capital cases and those involv-

ing the construction or application of the Constitution of the United States. There is no constitutional question whatever involved in this case; no suggestion of such question has so far appeared in it. Nor does the case involve any other question upon which it could be brought here under section 5 of that act.

The only question which was raised by the immunity plea, and which plaintiff in error now seeks to review, is whether the defendant Heike brought himself within the provisions of the act of February 25, 1903 (32 Stat., 904, ch. 755), as amended by the act of June 30, 1906 (34 Stat., 798, ch. 3920), familiarly known as the immunity provision of the Sherman Anti-trust law. These acts are set forth in Appendix D.

The specific question involved in the plea of immunity, as appears from the opinion of the court submitted herewith (Appendix B), is whether or not the defendant Heike is being prosecuted or subjected to any penalty "for or on account of any transaction, matter, or thing" concerning which he had heretofore given testimony before the grand juries, a question not falling under any of the cases set forth in section 5 of the Circuit Court of Appeals act.

As the case is not yet on the docket of this court and allowance of the writ of error was given on *ex parte* application to Mr. Justice Lurton, it should be said that his consent to the submission of such a motion as the present to the entire court was asked by the Government and was given.

It is submitted, therefore, that the orderly and prompt administration of the criminal law in this case requires that the trial of the defendant should proceed, and that his plea of not guilty be determined, and that either the order allowing the writ of error be vacated, or at least that the order staying proceedings in the lower court be vacated.

LLOYD W. BOWERS,
*Solicitor-General*

FEBRUARY, 1910.

## APPENDIX A.

*Notice of motion and affidavit.*

UNITED STATES OF AMERICA, IN THE SUPREME COURT.

CHARLES R. HEIKE, PLAINTIFF IN ERROR,
*vs.*
THE UNITED STATES, DEFENDANT IN ERROR.

SIR: Take notice that upon the plea and replication and rejoinder herein, the opinion of the court and verdict thereupon and the plea of not guilty thereafter entered by the plaintiff in error and received by the court, and upon the annexed affidavit of Henry L. Stimson, as well as upon all the proceedings herein, I shall move the Supreme Court, at the opening thereof on Monday, February 28, 1910, or as soon thereafter as counsel can be heard, that the order allowing the writ of error granted herein on February 25, 1910, be vacated and that the supersedeas and stay of proceedings, also granted herein on said date, be vacated and set aside, and for such other and further relief in as to the court may seem just.

Yours, very truly,

GEORGE W. WICKERSHAM,
*Attorney-General.*

FEBRUARY 26, 1910.

Service copy admitted Feb. 26, 1910, 12.40 p. m.
JOHN B. STANCHFIELD.

Service of a copy of within affidavit and notice of motion is hereby admitted Feb. 26, 1910, at 1.30 p. m.
GEORGE S. GRAHAM.

UNITED STATES OF AMERICA, IN THE SUPREME COURT.

CHARLES R. HEIKE, PLAINTIFF IN ERROR,
*against*
THE UNITED STATES, DEFENDANT IN ERROR.

UNITED STATES OF AMERICA,
*Southern District of New York.* } *ss:*

Henry L. Stimson, being duly sworn, deposes and says: I am special assistant to the Attorney-General and represent the United States in this prosecution. The indictment herein was found on January 14, 1910. It contained six counts charging offenses under section 5445 and section 9 of the customs administrative act and also section 5440, the general conspiracy law. On January 24, 1910, the defendant, Heike, filed his plea herein, claiming immunity; on February 1, 1910, the United States filed a replication traversing the said plea.

On February 10, 1910, the issues thus raised were brought on for trial before Judge Martin and a jury sitting in the Circuit Court for the Southern District of New York. At the opening of the said trial counsel for defendant Heike applied for leave to file an additional plea in bar, containing certain amendments to the original plea. Upon my consent the court accepted this additional plea and it was filed. I therefore asked the leave of court to have the replication to the original plea stand as the replication to the additional plea. This was consented to and ordered by the court. After testimony had been taken the defendant Heike moved for the direction of a verdict in favor of the defendant upon the plea, and the Government moved the court for the direc-

tion of a verdict in favor of the United States upon the plea and replication. After hearing argument the court directed a verdict upon the issues raised by the plea and replication in favor of the Government.

The stenographer's minutes record the transaction as follows:

Mr. STANCHFIELD. The defendant excepts, if your honor please, to your refusal to grant a motion or to instruct the jury to return a verdict sustaining the immunity plea upon the ground that the evidence warrants it.

The COURT. The defendant excepts to the motion made for a verdict and excepts to the court's granting a motion on the part of the Government?

Mr. STANCHFIELD. Yes, sir; and I was about to say that we except to your granting the motion of the counsel for the Government against the plea; *and upon the general issues the defendant, your honor, if you please, pleads not guilty.*

Mr. STIMSON. I was going to suggest my friend's plea is premature. Has your honor yet directed a verdict?

The COURT. Well, he understands so.

Mr. STANCHFIELD. I have not heard the jury render any verdict of the court yet.

(The foreman of the jury signed a written verdict pursuant to directions of the court.)

Mr. STIMSON. I am going to ask whether the defendant has any further motions before the motion for sentence.

Mr. STANCHFIELD. We have no motions; we plead not guilty to the indictment. (S. M., pp. 316–317.)

Thereupon the court asked the Government whether any objection was made to the allowance of this plea, and Mr. Stimson for the Government replied that while he considered that the matter lay in the discre-

tion of the court, under the circumstances of the case the Government would not oppose the granting of this privilege of pleading over if the court in its discretion took the same view. Thereupon the court stated that the Government, not opposing, it would accept the plea, and the plea thereupon was received by the court and entered, and upon the motion of the Government the case was set for trial on Tuesday, March 1, 1910, at 10.30 o'clock a. m. No objection whatever to this was made by the defendant or his counsel.

The indictment herein names five other persons as codefendants with the defendant Heike. All of these defendants have pleaded not guilty and the case as against them stands for trial also on March 1, 1910, at the same time. The case is a very long and complicated one and its trial will occupy at least a month of the court's time.

The calendars of the Circuit Court in the Southern District of New York are notoriously congested. In fact the present case has been set specially for trial before Judge Martin, of the Vermont District, on account of this condition of the calendar and on account of the engagements of the New York judges. It would involve a complete derangement of the sessions of the court if this case were now compelled to be adjourned for any considerable period or if by a severance it was made necessary to try these defendants separately.

HENRY L. STIMSON.

Sworn to before me this
26th day of February, 1910.
[SEAL.] CHAS. S. MCVEIGH,
*Notary Public,*
*New York County.*

## Appendix B.

### *Opinion of Court on Immunity Plea.*

Martin, *J.* (orally): This defendant is indicted with others for defrauding and also for entering into a conspiracy to defraud the Government of the United States of its customs on certain sugars that have been imported by the American Sugar Refining Company. So far as this issue is concerned the defendant does not deny his guilt. He has filed a plea in bar, and by it brings upon the record a new issue whereby he asserts that there exist certain facts which, though he may be guilty of all that is charged in this indictment, he can not be prosecuted or punished for. His attorneys in his presence claimed the opening and the affirmative of this issue and to this the attorney for the Government assented. The ordinary legal presumption of innocence has been by the defendant voluntarily withdrawn by this plea in bar. He has chosen this issue and thereby takes the affirmative, and in so doing he must establish facts pleaded—the same having been traversed by the counsel for the Government—by a fair balance of evidence; or, in other words, by this plea the burden of proof rests upon the defendant.

It is claimed by counsel for the defendant that even this issue so volunteered by this plea should be sustained unless found to the contrary beyond a reasonable doubt. If such was to be held the law, men of means who were able to secure the services of competent and adroit attorneys could block the wheels of

justice by successive pleas in bar and perhaps succeed upon some mere conjecture that the defendant said or did something before the grand jury whereby he *may* be shielded by the statute of immunity. Evidence beyond a reasonable doubt is only applicable to criminal cases wherein the defendant pleads not guilty. A plea of confession and avoidance removes the requirement of that degree of proof. (*State* v. *Ellsworth*, 131 N. C., 773; 42 S. E., 699; *Com.* v. *Daley*, 4 Gray, 209.)

This case presents the question whether or not the defendant testified before the grand jury to any transaction, matter, or thing in reference to the offenses alleged against him by this indictment. Is there a balance of evidence tending to show that his testimony before the grand jury, or the documents that he produced there, will probably become a link in a chain of evidence to establish his guilt? Not whether some ingenious mind may carve out of the mass of innocent facts, to which the inquiry before the grand jury related, some hidden fact whereby it is *barely possible* that the same would be used against him. If the court were to resort to that extreme, it would result in a dangerous practice and thwart the ends of justice. Such is not the law governing the trial of an issue raised by a plea in bar. The true rule is, Is it probable, from the evidence adduced, that the defendant testified to some matter or thing for or on account of which he now stands charged as a criminal? (*United States* v. *Burr*, 25 Fed. Cas., No. 14692; *Brown* v. *Walker*, 161 U. S., 591, 599–600; *Ex parte Irvine*, 74 Fed., 156; *R.* v. *Boyes*, 1 B. & S., 331.)

It is claimed here that the mere statement of the accused before the grand jury that he was an officer—the secretary—of the American Sugar Refining Com-

pany is a fact that affords him immunity. Can it be that Congress intended by this immunity statute to afford a shield to a man who has committed a crime by merely swearing to something that is already notorious, and where neither civil nor criminal justice can be in the least advanced by the disclosure? Such a construction, to my mind, would be a perversion of justice. (See *Rudolph* v. *State*, 128 Wis., 222.)

The thing mainly relied on, however, by counsel for the defendant is that he produced documentary evidence tending to show the amount of sugar melted at the Havemeyer and Elder docks, those being docks at which the fraud is alleged to have been perpetrated. This seems to have been a voluntary act on his part, unless it was compulsory by virtue of the subpœna. The subject-matter of investigation by that grand jury before which the defendant was summoned was an alleged violation of the Sherman Act. No claim was there made that the Government was defrauded. The claim there was that the conduct of this sugar company was such that the rights of the people were affected by the restraint of trade, and the request of the defendant was that he procure from the books of the company the amount of sugar melted in all of its different refineries, which included, of course, the Havemeyer and Elder Refinery, and it bore upon the question as to whether this sugar company, as a corporation, was reaching out and laying its hands upon other companies in restraint of trade; or, in other words, had it brought into its own grasp the sugar-refining business of this country to the detriment of the people? The defendant testified on this trial that no question was put to him or any request made of him whereby his guilt of the charges set forth in this indictment was even thought

of by him. If he did not think of it, how can it be conceived that the attorney for the Government thought of it? Besides, the defendant testified that he had no knowledge of the quantity of sugar actually melted in any of the refineries of the sugar company until his clerks made the computation requested. He does not even swear that they made a correct one. Is it fairly probable to assume from this evidence that the making of that schedule, about which the defendant knew nothing—purely the result of the examination of the books of the corporation—was the furnishing of evidence, or the source of evidence, to convict him of this charge of fraud and conspiracy? The statute simply protects the defendant from furnishing evidence against himself, not others. (See *Brown* v. *Walker*, 161 U. S., 591, 600).

Again, a witness testifying to documentary evidence found in the records of a corporation, if perchance an inquiry were made that may furnish evidence of his guilt, he should then assert his immunity. An officer of a corporation has testimonial powers to extract from its records a mass of facts, usually innocent and which relate only to his administrative duties. The inquiry of the defendant before the grand jury was relevant to general facts apparent upon the books of the company, and facts of which the company invited investigation. The defendant knew prior to the time of his testimony that the president of his company had written to the Secretary of the Treasury of the United States and to prosecuting attorneys, inviting the fullest and freest examination of the books of the company. The defendant, as secretary of the company, had promulgated to the public through the columns of the newspapers the willingness to furnish the Government with any fact

that the books of the company might reveal. Under such a state of facts if that investigation before the grand jury by the Government, following the invitation of the officers of the company, revealed any material fact that might incriminate this defendant, he should have asserted it and thus warned the attorney, so that he could submit it to the court, so that the court could exercise his discretion whether to proceed further, grant the immunity, or stop short of it. (See *Wigmore on Evidence*, sec. 2281a, p. 241.)

The immunity provided by this statute was intended to afford an investigation without its being interrupted by the constitutional privilege of silence, or, in other words, under the Constitution, as under the common law, a witness is not obliged to incriminate himself. But to avail himself of that privilege he must ordinarily assert it. (*United States* v. *Kimball*, 117 Fed., 156, 163; *State* v. *Murphy*, 128 Wis., 201; 5 Wigmore on Evidence, sec. 2281*a*.)

Whether the immunity statute flows out to a witness testifying depends on circumstances. This statute of immunity must be administered with common sense. On the one hand, some questions are of such character that the witness would understand naturally and inferentially that he would be immune if he answered, and thus proceed to answer without asserting his right, while under other circumstances it would be his duty to assert it if he intended to rely on it. The administration of this statute involves the same application of common sense that the English court refers to in the Boyes case (1 B. & S., 331) in language approved by the Supreme Court:

"To entitle a party called as a witness to the privilege of silence the court must see from the circum-

stances of the case and the nature of the evidence which the witness is called upon to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. * * * The witness's danger being made to appear, great latitude should be allowed to him." (*Brown* v. *Walker*, 161 U. S., 591, 599.)

Chief Justice Marshall, in the Burr case, uses this language:

"When two principles come in conflict with each other, the court must give them a reasonable construction so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen and the principle by which every witness is privileged not to accuse himself can neither of them be entirely disregarded." (25 Fed. Cas., at pp. 39–40.)

Applying that principle to the case at bar, the defendant has failed to maintain his plea. Neither he nor the government attorney, so far as appears here, had the slightest idea that this defendant in his evidence before the grand jury revealed a single fact that could be made use of in establishing his guilt, or of any matter or thing to which this indictment relates. The need of vigorous investigation and punishment of offenders of the law is at least as apparent to-day as it ever was, and it is equally apparent that Congress has intended to clothe the Department of Justice with full power to enforce the mandates of the law and to cover the guilty with the mantle of immunity only when essential to ascertain material facts. Immunity or the constitutional privilege for which it is intended as substitute should not be enjoyed beyond a reasonable protection. It relates not to the innocent, but to the guilty, or him who fears prosecution. It is argued that to require the guilty to assert immu-

nity or the constitutional privilege is embarrassing, and might result in the necessity of an astute lawyer to advise when and under what circumstances to assert his rights. That may be so. The circumstances may be such that the court should hold that the witness is entitled to immunity, even though not asserted or claimed. No circumstances of that sort, however, are shown here. The very contrary appears.

In this connection the question of good or bad faith on the part of the prosecuting officers is important. Not only is there a total failure to show any bad faith, but quite the contrary appears from the evidence. There is no evidence that the defendant revealed any fact that will probably be necessary in establishing any guilt that can not be obtained from other sources and was not known or in the possession of the Government, except possibly as to the amount of sugar melted by the sugar company in its various refineries, and as to these melting figures the defendant testified at this trial that he knew absolutely nothing.

It is perfectly clear that there was no attempt to extract from this defendant any fact to be used against him on any criminal charge of fraud.

Neither side asked that this case be submitted to the jury. There is no dispute as to the facts, and upon the undisputed facts the defendant has wholly failed to establish the allegations of his plea, and there should therefore be a verdict ordered to that effect.

## Appendix C.

*Docket Entries in United States* v. *Charles R. Heike et al.*

United States
*v.*
Charles R. Heike, Ernest W. Gerbacht, James F. Bendernagel, Harry W. Walker, Jean M. Votlker, James F. Halligan, jr.

Henry A. Wise, United States attorney. Henry F. Cochrane, Lexow MacKellar & Wells, John B. Stanchfield.

Sections 5445, 5440, section 9, act June 10, 1890.

1910.

Jan. 14. Entered presentment of indictment.
14. Filed indictment.
17. Defendant Heike pleads not guilty; one week to withdraw. Bail, $5,000.
17. Defendant Gerbacht pleads not guilty; one week to withdraw.
17. Defendant Bendernagel pleads not guilty; one week to withdraw.
17. Defendant Walker pleads not guilty; one week to withdraw. Bail, $3,000.
17. Defendant Votlker pleads not guilty; one week to withdraw.
17. Defendant Halligan, jr., pleads not guilty; one week to withdraw.
24. Defendant Heike files plea in bar.

1910.

Jan. 24. Defendants Gerbacht, Walker, Votlker, Bendernagel, and Halligan plead not guilty, with leave to withdraw and file plea in bar on January 28, 1910.

28. Filed plea in bar of Gerbacht.

28. Filed plea in bar of Bendernagel.

28. Filed plea in bar of Walker.

28. Filed plea in bar of Halligan, jr.

28. Filed affidavit and order impounding five letterpress books.

17. Filed recognizance of Heike.

17. Filed recognizance of Walker.

Feb. 2. Filed replication to plea in bar as to Heike.

2. Filed replication to plea in bar as to Gerbacht.

2. Filed replication to plea in bar as to Bendernagel.

2. Filed replication to plea in bar as to Walker.

2. Filed replication to plea in bar as to Halligan, jr.

4. Defendant Gerbacht withdraws plea in bar and pleads not guilty.

5. Defendant Bendernagel withdraws plea in bar and pleads not guilty.

5. Defendant Walker withdraws plea in bar and pleads not guilty.

5. Defendant Halligan, jr., withdraws plea in bar and pleads not guilty.

5. Defendant Heike filed rejoinder to replication to special plea in bar.

10. Filed additional plea in bar, Heike.

10. Trial begun as to Heike plea in bar.

11. Trial continued and adjourned to February 14.

1910.

Feb. 14. Trial concluded. Verdict dismissing "plea in bar" entered.

14. *Defendant Heike pleads not guilty.*

26. Filed stenographer's minutes by telephone order from Judge Martin. Stenographer's minutes delivered to Mr. Dennison, Assistant Attorney-General, the same to be returned by the said Dennison to the files of this court.

26. Filed order re stenographer's minutes.

A true transcript of the docket entries.

JOHN A. SHIELDS,
*Clerk.*

UNITED STATES OF AMERICA,
*Southern District of New York, ss:*

I, John A. Shields, clerk of the Circuit Court of the United States in and for the Second Circuit and Southern District of New York, do hereby certify that I have compared the preceding with the original docket entries on file and of record in my office, and that the same is a true and correct transcript therefrom, and of the whole of said original.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of New York, in the district and circuit above named, this 26th day of February, in the year of our Lord 1910, and of the Independence of the United States the one hundred and thirty-fourth.

[SEAL.] JOHN A. SHIELDS,
*Clerk.*

*Extract from stenographer's minutes on trial of immunity plea in U. S. v. Heike.*

Mr. STIMSON. I was going to suggest this consideration at once: That the case should be set for trial for the opening of the March term, on March 1, if no other suggestion occurs to the court.

Mr. STANCHFIELD. I haven't anything to say to that suggestion at the present time.

Mr. STIMSON. The statute in regard to demurrers, section 1026, expressly makes that as one of the conditions suggested by the statute, that the case shall proceed at the same term in case of a respondiat ouster. Now, I do move for a direction of the court that this case now be set for trial on March 1.

The COURT. I understand it has been so understood by counsel all around.

Mr. STIMSON. There has been no ruling by the court, and this is a situation which now arises for the first time as to this defendant.

The COURT. The case may be set for trial on Tuesday, March 1, 1910, at 10.30 o'clock a. m.

## Appendix D.

### *Applicable Immunity Statutes.*

*Provided*, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under said acts: *Provided further*, That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. (Act of February 25, 1903, 32 Stat., 854, 904, c. 755.)

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*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That under the immunity provisions in the act entitled "An act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the act entitled "An act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and in the act entitled "An act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and in the act entitled "An act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth,

nineteen hundred and four, and for other purposes,' approved February twenty-fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpœna, gives testimony under oath or produces evidence, documentary or otherwise, under oath. (Act of June 30, 1906, 34 Stat., 798, c. 3920.)

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

CHARLES R. HEIKE,

*Plaintiff in Error,*

v.

THE UNITED STATES.

On Allowance of Writ of Error and Stay of Proceedings by Mr. Justice Lurton to the Circuit Court of the United States, for the Southern District of New York.

BRIEF OF PLAINTIFF-IN-ERROR IN OPPOSITION TO MOTION TO VACATE ORDER ALLOWING WRIT OF ERROR AND VACATE SUPERSEDEAS AND STAY OF PROCEEDINGS.

JOHN B. STANCHFIELD,
GEORGE S. GRAHAM,
*For Plaintiff in Error.*

JOHN C. SPOONER,
*Of Counsel.*

BYRNE, STEVENS COMPANY, 49-51 VESEY STREET, NEW YORK.

IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1909.

CHARLES R. HEIKE,
Plaintiff-in-Error,

v.

THE UNITED STATES.

## WRIT OF ERROR AND STAY OF PROCEEDINGS ALLOWED BY MR. JUSTICE LURTON TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

**Motion to Vacate Order Allowing Writ of Error, and to Vacate Supersedeas and Stay of Proceedings.**

**BRIEF OF PLAINTIFF-IN-ERROR IN OPPOSITION TO MOTION.**

### HISTORY OF CASE.

On January 14, 1910, an indictment was presented against Charles R. Heike and others, charging them with violations of the customs law in

connection with the fraudulent importation of dutiable sugar, and conspiracy under Section 5440 of the Revised Statutes to defraud the United States, and to commit offenses under the customs laws.

On January 24, defendant Heike filed a plea of immunity.

On February 10th, trial was begun upon this plea, and adjourned from day ao day until February 14th, when a verdict was rendered by the jury, by direction of the Court, in favor of the Government upon said plea.

The same day, the Court ordered the case to be set for trial on March 1st, 1910, upon the issue of not guilty.

On February 23, 1910, an application was made to Mr. Justice LURTON for a writ of error and stay of proceedings. The matter was fully discussed, and all the facts in connection with the case carefully stated to Mr. Justice LURTON, who, after consideration, on Friday, the 25th day of February, 1910, granted the writ of error and stay of proceedings, and notice was sent to appellant's counsel by wire on that day, although the papers themselves did not reach New York until Saturday, the 26th day of February.

A copy of the application to Mr. Justice LURTON, with the assignments of error accompanying the petition, the order granting the writ, the citation allowed, and the writ of error, are hereto attached, marked Exhibit "A."

Upon this order, the writ was duly issued and served and is now outstanding.

At 12:40 A. M. on Saturday, the 26th day of February, a notice and affidavit, a copy of which is hereto attached and marked Exhibit "B," was

served upon Mr. Stanchfield, not the counsel of record on the writ of error, but one of the counsel for Charles R. Heike, and, later in the day, at 1:30 P. M., a similar notice was served upon Mr. Graham, the counsel of record.

The defendant, Charles R. Heike, during June and December of 1909, and January, 1910, in response to a personal subpœna with *duces tecum* clause, appeared before the several Grand Juries meeting in those months, was duly sworn as a witness and examined in a "proceeding" under the Sherman Anti-Trust Law, and gave testimony therein orally and by production of books and papers of and concerning certain acts, matters and things, some of "which must necessarily be proven in order to establish the offence charged to have been committed by Heike in the indictment in this case.

## BRIEF FOR APPELLANT.

**The motion of which notice was thus given is in defiance of Rule VI of this Honorable Court with respect to motions to dismiss writs of error and appeals.**

Section 4 of Rule VI provides as follows:

> "(4) All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, must be submitted *in the first instance on printed briefs or arguments.* If the Court desires further argument on that subject, it will be ordered *in connection with the hearing on the merits.* The party moving to dismiss shall serve notice of the motion, with a copy of his brief of argument, on the counsel for plaintiff-in-error or appellant of record in this court, *at*

> *least three weeks* before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days."

The writ of error herein was allowed on February 25, 1910, was served on February 26th, the notice of this motion antedated the service of the writ, and the motion was made returnable on Monday, the 28th day of February, at which time it was in an informal way, orally discussed before this Court against the protest of the plaintiff-in-error, and leave given to the plaintiff-in-error to reply to the motion and papers submitted therewith on behalf of the Government, on Monday, March 7, 1910.

We submit that, as the case has not been docketed, the Supreme Court could not entertain this motion, which is plainly premature under the established and unbroken practice of the Court. We submit that this case, involving, as it does, the liberty and reputation of a citizen, who is presumptively innocent of the crime with which he is charged, should not be heard or considered by the Court upon a motion to dismiss, without the full time which the rules of this Court wisely allow upon such motions to dismiss, being granted.

The Government, however, now asks this Court to disregard its own rules and unbroken procedure in order that this plaintiff-in-error, a presumptively innocent man, may be forced to trial in plain violation of his right under the immunity statute, and without adequate opportunity to prepare his defence.

The Government contends that this cannot harm

him, if he is subsequently acquitted, but unless this Court entertains this writ of error, he will be denied an immunity from prosecution given to him under the statute in lieu of the constitutional privilege and safeguard against self-accusation embodied in the Fifth Amendment and no subsequent action of this Court after either conviction or acquittal can repair the wrong thus done. *His right to immunity from prosecution must be vindicated under this writ of error, or the immunity from "prosecution" will be forever lost.*

In obedience, however, to the direction of the Court, we make answer to the printed brief which was only handed to counsel on the date of the return of the motion, namely, Monday, the 28th day of February, in the court room when the case was actually on before this Court.

## ARGUMENT.

### I.

**The Court will not decide motions to dismiss, before the record is printed, where there is any question about the facts upon which the motion rests.**

In *Bank* v. *Insurance Company,* 100 U. S., 43 (25-547), October Term, 1879, it was held:

> "The Court will not decide motions to dismiss before the record is printed where there is any question about the facts upon which the motion rests. To get a decision before printing, the motion papers must present the case in a way which will enable the Court to act intelligently without referring to the transcript on file."

It is respectfully submitted that it is impossible

to have the bill of exceptions, which contains a multitude of extracts from books and papers, completed and settled in time for the argument of this motion. Much less is it possible to have the record printed.

**In this case there is a very important question about the facts upon which the motion rests, and therefore the motion should stand over until the record is before the Court.**

In the copy of docket entries, Appendix C to defendant's printed argument, there appears an entry under date of February 14, 1910: "Trial concluded. Verdict dismissing plea in bar entered."

There was no such verdict rendered in the Court below. The docket entry is not the record. The signed verdict is the record. Under the instruction of the Presiding Judge, the jury rendered a signed verdict in favor of the Government upon the plea of immunity. Thereupon the Court orally gave leave to the defendant to plead over, and a plea of not guilty was entered.

Plaintiff-in-error had a right to assume and believe, that the record in this case would show that judgment was entered upon this verdict in favor of the Government, with leave to the defendant to plead over.

An application was made on March 2, 1910, to Judge MARTIN, who tried the case, requesting that the proper entry should be made, and that this erroneous entry should be corrected by striking out the word "verdict" and inserting in lieu thereof the word "judgment." Upon objection by Mr. Stimson, the special assistant to the Attorney-General, the Court refused to grant the motion, or

correct this untruthful entry as it now stands upon the docket, and in consequence the plaintiff-in-error presents herewith his petition for a mandamus directed to Judge MARTIN, requiring the amendment and completion of the record, according to the fact.

During the discussion on this application for the making of this entry, it was admitted that the docket entry above quoted did not truly state the verdict, if that was what it was intended to cover. The verdict itself is in writing and signed by the foreman of the jury, and is a verdict for the Government by the peremptory direction of the Court upon the issue raised by the pleadings, viz.: the immunity plea, the replication, and rejoinder thereto.

The following quotation from the minutes of what took place on March 2d on the occasion of the motion to correct this record, shows clearly that the docket entry in question does not correctly set forth the proceedings:

> "The Court: As to the verdict, the records of the clerk show that. It does not need the order of the Court; there is no correction to be made there that the Court set the trial for March 1st at 10:30 o'clock in the forenoon, because the records of the Clerk show that. The only thing that the Clerk's records *does not show* is that the Court made an order that the plea in bar be dismissed, and I have no recollection of any such order being made, but my understanding of it is that what transpired amounted to that in legal effect."

In view of the fact, therefore, that one of the questions upon which this motion rests is disputed, it is urged upon the Court that, following Sec. 4

of Rule 6 of this Court, above quoted, no action should be had upon this motion until the record is completed.

**At least this motion ought to rest undecided until action is had upon the petition for mandamus directed to the Court below, to make the proper and formal entry upon the verdict.**

The entering of judgment upon the verdict (which is in favor of the United States), is a duty resting upon the Prosecuting Attorneys, and one which they should see was properly executed. It does not lie in their mouth to object on this technical ground when the failure to have this entry made is due to their own laches or intentional neglect. Surely, the liberty and Constitutional rights of this plaintiff in error, ought not to be made to turn upon this technical criticism with reference to the form of the judgment in the Court below.

Just how technical is this criticism is shown by the Certificate of the Clerk of the Court below annexed hereto as Exhibit C.

Furthermore, the record when before this Court will disclose that the plea of not guilty which was entered, was entered under duress. Mr. Stimson, the assistant to the Attorney General, gave notice to the defendant that if he dared to stand upon his plea of immunity, and it should be decided against him, he would thereupon move for judgment and sentence without a trial upon the merits of the case. In this he was supported and sustained by the remarks of Trial Judge made at that time. And, as the quotation from the minutes on page 9 of the moving papers discloses,

after the verdict in favor of the Government upon the plea of immunity, Mr. Stimson inquired whether the defendant had any further motions before the *motion for sentence;* and he was only restrained by the Court (who had changed his mind) taking the responsibility of deciding that, under the circumstances of the case, he would not impose sentence upon the defendant, but would permit him to plead over.

In addition to this, the record discloses that *by a decision of the Court below* the case was set for trial on Tuesday, March 1st, 1910, at 10:30 o'clock, A. M., on the issue raised by the plea of "Not Guilty."

So that it may be safely argued that it is apparent, even from the imperfect and inaccurate record which is before the Court, that everything that entered essentially into a judgment or decision, existed in this case before the writ of error was sued out. The rights of the defendant were taken from him when the order was entered "Verdict dismissing plea in bar," as effectually as if the words were, "Judgment for the Government on the verdict, plea of immunity dismissed, with leave to plead over."

The order of the Court directing the plaintiff in error to go to trial on Tuesday, March 1st, 1910, could only have been made after the entry of judgment upon the verdict upon the immunity plea, and this very order is a violation of the rights of the plaintiff in error as guaranteed to him by the immunity statutes, which distinctly say, that "No person *shall be prosecuted,* or be subject to any penalty or forfeiture for, or on account of any transaction, matter, or thing con-

cerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said acts."

The order to proceed to trial is a final and appealable order under these circumstances, as much so, as an order to punish a witness for contempt who declined to answer, under the privilege of the Constitution, before the immunity law became its substitute. The *equivalent* for an order to punish for contempt one who exercised the old Constitutional privilege, exists in the order to proceed to trial which is an order to "prosecute" in violation of the immunity of the statutes.

## II.

**Want of jurisdiction, and irregularity of writs of error, are the only grounds for dismissal, on motion.**

Where it appears that a judgment has been rendered which the Court has jurisdiction to revise, and that it comes up upon proper process, duly issued, all other questions must await the final hearing.

> Hecker v. Fowler, 1 Black, 95, 96; December Term, 1861.
> Dewhurst's Rules of Practice in the U. S. Courts, p. 70.

In the notice served upon us, and the moving papers, the only grounds alleged by defendant in error in support of this motion, are the following:

> A. A plea of not guilty was thereupon entered by the defendant, and received by the Court, and the case was set for trial on Tuesday next, March first.

B. There being no final judgment of the Circuit Court, there is no right to review by this Court in the present status of the case.

C. There is no constitutional question whatever involved in this case. No suggestion of such question has thus far appeared in it; nor does the case involve any other question upon which it could be brought here under section 5 of the Circuit Court of Appeals act.

We answer each proposition in the order named.

**A. "A plea of not guilty was thereupon entered by the defendant, and received by the Court, and the case was set for trial on Tuesday next, March 1st."**

The entry of the plea of not guilty does not in any manner affect the question which will be brought before this Court by the writ of error allowed in this case.

The right to a writ of error, and the jurisdiction of this Court to review the question raised by the immunity plea, are distinct and separate from and stand unrelated to the question raised by the plea of "not guilty." If the judgment or decision dismissing the immunity plea is appealable, the entry of the plea of "not guilty" is unimportant. That plea is not only not consistent with the plea of immunity but in fact strengthens it.

The plaintiff-in-error was *obliged* to place his plea of not guilty upon the records, in order to avert sentence, the threatened action of the Prosecuting Attorney.

The entry of that plea, however, cannot affect the right to a review of the questions raised by the immunity plea, because they are separate and distinct questions, and not in any manner involved in the plea of not guilty, and are questions which

have been finally determined against the plaintiff-in-error.

Indeed both pleas might have been pleaded at the same time. It accorded with the Rules of Criminal Procedure that they might stand together although the special plea must first have been disposed of.

> Com v. Merrill, 8 Allen, 545; 1 Bishop Crim. Proc., 752.
> Thompson v. United States, 155 U. S., 273.

It is unnecessary to further pursue or discuss the effect of this entry of the plea of not guilty, except to refer to the fact that it is covered by the discussion of the next point, which involves the question whether the order made in the Court below is definitive of an independent matter, and appealable under the law.

**B. "There being no final judgment of the Circuit Court, there is no right to review by this Court in the present status of the case."**

In the excerpts from the minutes and the record heretofore referred to and contained in the moving papers, it clearly appears that an immunity plea was filed in this case, to which the Government replied, and issue was joined upon that plea. That plea, thus framed, raised the question of the right of Charles R. Heike to *immunity from prosecution.*

Pleas of *autrefois acquit*, and *autrefois convict*, and pleas of former jeopardy, and the like, are defenses and rest upon a wholly different basis from the plea in question. Under the language of the immunity statute, which is: "No person shall be *prosecuted,*" the person who brings himself within the provisions of that act is thereafter to be free

from prosecution. It is therefore a primary and preliminary question, which was raised at the earliest possible moment, and which must be definitively settled before there shall be any right to proceed upon the indictment with a prosecution of the person. If this plea is good no Court has the right to try him, and no prosecuting officer has a right to place him in jeopardy.

If the trial should proceed the party suffers an irreparable loss. That which the statutes pledges in lieu of the Constitutional privilege under the Fifth Amendment is taken away. Should he be acquitted nevertheless he has been placed in jeopardy and this the law exempts him from; should he be convicted and afterwards a higher Court decide that he was entitled to his immunity, then the man may be set free from a sentence, but that is not what the nation has pledged in place of his Constitutional right, and besides he will have suffered the ignominy of trial, loss of liberty pending appeal, the humiliation of sentence, when the law says *he shall not be "prosecuted."* To permit the trial to proceed takes away that which can never be restored. It robs him of that which the law intended should be his, and which no subsequent review at a later stage can possibly restore.

What constitutes a final judgment or decree has often been discussed in our Federal Courts.

The rule as to what will constitute finality and give the appealable quality is alike in civil and criminal matters.

In the case of *Forgay and others* v. *Conrad,* 47 U. S., 201, where a decree had been entered setting aside certain deeds of the defendants in suit, and directing the Master to proceed to take an account of the profits of the lands and slaves ordered to

be delivered up, and directing that certain other matters should be retained for further decree in the premises, and an appeal was taken by two of the defendants in the suit to whom deeds of conveyance had been executed, and whose deeds were set aside as fraudulent, it was urged before the Supreme Court that the decree was not final. Chief Justice TANEY said:

> "Undoubtedly, it is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature."

Further on in the opinion, he says:

> "And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

It was, accordingly, held that the decree was a final one, from which an appeal would lie.

In the case of *Brush Electric Co.* v. *Electric Improvement Co.*, 51 Fed. Rep., 557, where the Brush Electric Company had been joined in the proceeding without its consent, and a motion was made

for the dismissal of the suit as to it, and a hearing was had on affidavits, and the Court overruled the motion to dismiss, whereupon an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, that Court held that the order should be deemed a final one, from which an appeal would lie, saying that the matter presented for consideration was not one presented by the bill of complaint or sought to be determined by it.

In speaking of final decisions which determine all the questions raised on the face of the pleadings, it was said:

> "Considering the construction given by the Supreme Court to the terms 'final decisions,' 'Judgments' or 'decrees,' we reach the conclusion that the term 'final decision' in said statute under consideration does not mean necessarily such decisions or decrees only which finally determine all the issues presented by the pleadings; that, while these are undoubtedly final decisions, the terms are not limited to them, but also apply to a final determination of a collateral matter distinct from the general subject of litigation, affecting only the parties to the particular controversy, and finally settles that controversy."

The controversy in this case over the immunity of Chas. R. Heike settles a collateral matter distinct from the general subject of the litigation.

In *McGourkey* v. *Toledo & Ohio Central Railway Co.*, 146 U. S., 536, there is a reference by Mr. Justice BROWN to a number of cases on the subject of what constitutes a final decree, and he uses this significant language:

> "This case, and the other cases above referred to, certainly make it clear that a decision in any particular proceeding which

> disposes of the whole matter litigated in that proceeding and leaves nothing thereafter to be done except the ministerial act of executing it, is a final decree or final judgment in that proceeding, and one which may be reviewed on appeal or by writ of error."

Undoubtedly the verdict rendered in the case below and the dismissal of the plea of immunity, was a final one in the sense that it exhausted the power of the Court in the proceeding in which it had been made. Nothing was left but the execution of the ministerial duty of proceeding to trial, or proceeding to prosecute.

Whenever in a cause there is a determination of some question of right, a decision is final in the sense in which an appeal from it is permitted, if it decides and disposes of the whole merits of the case as between the parties on that issue.

It may be argued that the present case is ruled by the decision in the case of *Alexander* v. *United States,* 201 U. S. Rep., p. 117.

The two cases, however, are clearly distinguishable. An appeal was taken in the case referred to, from an order requiring a witness to answer certain questions and to produce certain books before a Commissioner. Mr. Justice McKENNA, who delivered the opinion of the Court, adopted as the correct statement of the law on that subject the following extract from the opinion of Circuit Judge VANDEVENTER, as follows:

> "I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to com-

> ply with it and the court then exercises its authority either to punish them or to coerce them into compliance that will give rise to another case or cases to which the witnesses will be parties on the one hand and the Government, as a sovereign, vindicating the dignity and authority of one of its courts, will be a party on the other hand. I have no doubt that a judgment adverse to the witness in that proceeding or case will be a final decision, and will be subject to review by writ of error, but not by appeal."

There is a line of cases upon this subject to the same effect. But all these cases clearly admit that if the court below should proceed *to compel the witness to answer,* that that would constitute a final, reviewable decision or judgment.

It will be observed that in the *Alexander case* the Court holds that when a final order is made against a witness in any proceeding which can be regarded as a suit or controversy to which he is a party, the right to appeal arises. That this is a correct statement of the court's views, is further shown by the manner in which Mr. Justice McKeena treats the previous decisions of the Court in the cases of *Interstate Commerce Commission v. Brimson,* 154 U. S., 447, and *Interstate Commerce Commission v. Baird,* 194 U. S., 25.

In the case at bar, the plaintiff in error, deprived of the constitutional defense provided by the Fifth Amendment, and covered by the substitute therefor in the immunity acts, claims that having given testimony which brought him within the provision of the latter acts, he ought not to be prosecuted. When his plea (assuming it to be well founded) is over-ruled by the Court, and he is ordered to proceed to trial, a state of affairs

exists that is exactly analogous to the witness who, having been ordered to answer questions or produce documentary evidence, declines and is thereupon proceeded against by way of contempt.

The only thing that can follow in this case, is prosecution; and the Court has ordered prosecution, and this stands in the place of the order of the Court directing punishment for contempt; so that this line of cases, while pointing out that the mere order of the court to answer is not appealable, do also show that where a compulsory order is entered upon the defendant, that this is an appealable order. In this case, the dismissal of this plea, which the Judge concedes occurred at the trial after the verdict which he directed had been entered, and the order made upon plaintiff-in-error to proceed to trial on March first—where steps, which render this judgment final and conclusive upon the question of immunity. The question of immunity is not one involved in the general issue, which is that of guilty or not guilty of alleged customs frauds and conspiracy. It is a separate and distinct privilege with which he is clothed by virtue of this statute in lieu of his constitutional right; and the order to proceed to trial, which is an order to prosecute him, is an over-riding of his constitutional privilege and his privilege under the immunity statute.

In the case of *Webster Coal & Coke Co.*, Petitioner v. *A. J. Cassatt, et al.*, decided December 2, 1907, number 283, October Term of that year, Chief Justice FULLER, delivering the opinion of the Court, while deciding in that case that the order appealed from was not a final or appealable order, did say, however, quoting what Mr. Justice BRADLEY said in *Williams* v. *Morgan* (111 U. S.,

684, 698), in holding a decree of intervention appealable, and citing many cases, that the order appealed from there was final in its nature, and was in a matter distinct from the general subject of litigation; a matter by itself, etc.

While the principle announced by Mr. Justice BRADLEY was applied in *Williams* v. *Morgan* to a question of intervention, it is one of another line of cases which furnish an illustration of the principle that where a conclusion is reached which is final upon the independent fact involved it is appealable. This principle is applicable generally, and has a bearing upon the question now being discussed. In other words, where the end reached is final in its nature, where the end reached closes up one matter or subject, and determines it, or a thing that exists separate and apart not involved in the general subject of the litigation, standing by itself, this constitutes an appealable order.

Surely the plea of immunity, which is without analogy in the law, in that it provides that the subject of the immunity shall not be prosecuted, when it has been presented, considered, and overruled—certainly the overruling of it is a decision or a judgment final in its nature, conclusive upon that particular matter, and it is a separate and distinct matter unrelated to the general issue in the litigation, which is, whether or not Charles R. Heike violated the customs laws of the United States, and committed an act of conspiracy.

**C. "There is no constitutional question whatever involved in this case. No suggestion of such question has thus far appeared in it; nor does the case involve any other question upon which it could be brought here under Section 5 of the Circuit Court of Appeals act."**

This subject really relates to a discussion of

the merits which cannot be had now. Only so far as there appears to be constitutional questions involved from a face view, is it of any importance on this preliminary motion.

This assertion contained in the brief of the Attorney General, is not accurate.

In the application for the writ there are constitutional questions stated most clearly. The undue and excessive haste on the part of the Government officers in this proceeding probably kept them from reading what was set out in our application. Certainly the Attorney General would not have made the statement that "No suggestion of a constitutional question has so far appeared," if he had read the petition for the writ of error.

When the record of the Court below comes here it will show that the construction put upon the immunity statutes in the Court below makes them less than the constitutional privilege and would make those acts unconstitutional. Our bill of exceptions is needed to make this clear.

This case involves the true construction and application of the Fifth Amendment to the Constitution of the United States, in conjunction with the Acts of Congress of February 25, 1903, Chapter 755, Section 1, as amended by the Act of June 30, 1906, Chapter 3920.

A criminal case may be taken directly from a Circuit Court to the Supreme Court of the U. S. under the Act of Congress of March 3, 1891, Chap. 517 and amendment thereof (Motes vs. United States 178 U. S., 459).

It also involves the consideration of the action of the Court below by which the plaintiff-in-error *was deprived of his constitutional right to trial by jury* as to the issues raised by his plea of im-

munity and the Government's replication thereto. The action of the Court in instructing the jury to find for the Government and against the defendant in said plea, was a denial of this right of trial by jury under the Constitution.

The First Point is one without precedent, because of the recent enactment of the immunity laws; and the second is elementary law in criminal cases, and it is contended that the rule extends to trials on special pleas in bar as well as to the general issue.

It is true in *Thompson vs. United States,* 155 U. S., 273, the history of the case shows that the Court below gave instructions to the jury on a plea of "former jeopardy," a special plea in bar, directing a verdict for the Government. This was not, however, the subject of an exception, nor considered or expressly ruled upon in that case.

It is urged that if this writ be permitted to stand it may result in a severance between this defendant and the other defendants involved in the case. The inquiry under this motion is limited to questions of jurisdiction and regularity in the issuance of the writ, and this reason is utterly immaterial, and ought not to be given the slightest weight.

Furthermore, it may be said that the delay of a few months in the disposition of this case is of trivial importance compared with the assertion of a right which involves the keeping of the Nation's plighted word of honor to one of its citizens imbedded in its statutes.

It is asserted that counsel knew that the action of Judge MARTIN in sustaining the Government's motion to direct a verdict on the immunity plea is not reviewable at the present stage of the case,

and a quotation is made from the minutes of remarks delivered in the course of the trial by Mr. Stanchfield, to support this averment. The remarks of Mr. Stanchfield in the record quoted, refer solely to the Act of Congress which had been passed to enable the Government to appeal in certain matters, and his thought was upon that statute in discussing the question. But, no matter what the thought may have been directed to, and no matter what he may have said in the course of that trial, if the fact remains that this defendant has a right to appeal, and that this decision is a final order and one within the jurisdiction of this Court to review, the mere remarks of counsel in the course of a trial cannot impair or destroy that right.

With respect to the suggestion made by the Attorney General that this writ of error has been sued out for the purpose of delay, it is only necessary to call the Court's attention to the fact that the indictment is but seven weeks old, and there has been no effort on the part of counsel for the plaintiff-in-error in any manner to hinder or impede the progress of the case. Otherwise, we would not be able within that short period to have tried before a jury the case of immunity, and presented in this Court our application for a writ of error to review substantial questions involved in that trial, and be here at this time ready to discuss this motion.

We do not discuss the merits of the case, because they are not before the Court under this motion. We cannot fairly discuss them without ample time for the preparation and the submission of a brief containing the views of counsel upon the questions involved.

It would be premature, and a denial of justice, to compel a discussion of the merits before the return of the record, and particularly before the settlement and return to this Court of the bill of exceptions, which will bring up the rulings of the Court below made upon important matters during the progress of the trial.

There is no disposition to hinder or delay this case. It is in itself a unique case, without precedent. Never before since the passage of these laws has there been a trial ending in such a ruling as the one made in this case in the Court below. It is one presenting fundamental and vitally important questions.

By this proceeding and this hearing, it is hoped that this supreme tribunal, with that deliberation and care for which it is distinguished, will settle the questions finally concerning the rights of a person who is dragged before a Grand Jury, Court or other tribunal, having no right to claim his constitutional privilege under the Fifth Amendment, but compelled by virtue of these acts of Congress to lay bare every question, fact or thing concerning which he may be examined in an Inter-State Commerce or Anti-Trust proceeding, without the aid or advice—and, indeed, relying upon the Nation's plighted honor, not seeking the aid or advice—of counsel, with full reliance upon the protection of the statute, yielding up, through books and documents, and orally upon oath, any and all evidence upon the subjects inquired about. The case is of grave importance, not only to the defendant, whose liberty is involved, but it is also vitally important with regard to the settlement of important questions, which shall serve to guide and govern in the ad-

ministration of the Sherman Anti-Trust Law and the Interstate Commerce Acts. It is important, moreover, to the Government in the maintenance of its policy to remove all obstacles and hindrances to a full and complete inquiry into everything that may be necessary to carry into effect those important statutes.

The application for the writ in this case having been made in due course to one of the Justices of this Court, who gave counsel for the plaintiff in error a full hearing, and to whom all the facts in the case were candidly and fairly revealed, and who considered the case for two days and then decided that this writ should issue and the stay be allowed, the issuance of the writ cannot be questioned upon any ground of irregularity. The application was regular, the allowance by a Justice was within the scope of his power, the writ itself is in due form, and has been properly served. So that it would appear that the only real question debatable under this motion is the question of jurisdiction, and, with respect to that, we earnestly contend that the papers before the Court disclose constitutional questions within the right of this Court to review, and the making of an order which is final and conclusive upon an independent matter and within the things determined by this Court as final or conclusive and appealable judgments under the law.

**In view of the novelty of the questions involved and their grave character and importance, and the great need, now, for a settlement of them as a precedent and guide, and above all other considerations the necessity to fully maintain and carry**

**out the nation's pledge of immunity, in letter and spirit, and secure to this plaintiff-in-error the full protection which these laws guaranteed to him in lieu of his Constitutional privilege under the Fifth Amendment, it is respectfully submitted that the motion should be denied and the case take the usual course under the rule of this Court, so that the plaintiff-in-error may have the right accorded to every other litigant of arguing the important questions orally.**

JOHN B. STANCHFIELD,
GEORGE S. GRAHAM,
For Plaintiff-in-Error.

JOHN C. SPOONER,
Of Counsel.

**Exhibit "A"—Petition for Writ of Error.**

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA,

OCTOBER TERM, 1909.

UNITED STATES OF AMERICA

versus.

CHARLES R. HEIKE, impleaded with ERNEST W. GERBRACHT, JAMES W. BENDERNAGEL, HARRY W. WALKER, JEAN N. FOELKER and JAMES F. HALLIGAN, JR.,

Defendants.

To the Honorable Justices of the Supreme Court of the United States:

The petition of Charles R. Heike, one of the above named defendants, respectfully shows:

I. That he was indicted on the 14th day of January, 1910, in the United States Circuit Court for the Southern District of New York, upon an indictment charging him with unlawfully making and effecting, and aiding in effecting certain entries of goods, wares and merchandise into the port and collection district of New York at less than the true weight thereof, and with conspiracy to defraud the United States of duties upon importations of sugar.

II. That thereafter he was arraigned upon said indictment in said court, and filed a plea in bar therein, which plea set forth that at certain times

therein mentioned, he brought before certain grand inquests of the body of the people of the United States of America, for the Southern District of New York in certain proceedings then and there pending brought under and in pursuance of the Act of Congress of July 2nd, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies" commonly known as the Sherman Anti Trust Act, and all acts amendatory thereof and supplementary thereto, and that in the said proceedings before the said grand inquests held pursuant to the said Acts of Congress as aforesaid, this defendant testified orally, and under oath produced evidence documentary concerning the transactions, matters and things set forth in the indictment herein, and for and on account of which this defendant was prosecuted under said indictment.

III. That thereafter, a replication was filed to the said plea in bar and issue joined thereon.

IV. That thereafter a jury was called and impaneled in said Circuit Court before the Hon. James L. Martin, a Judge of the said Court, and the issues raised by the said plea in replication were tried in said Court, and evidence was introduced on behalf of this defendant, and on behalf of the Government therein.

V. That the evidence offered on said trial on behalf of said defendant, showed that in the said proceedings before the said grand inquests under the said acts of Congress as aforesaid, this defendant did testify, and did produce evidence documentary under oath, concerning transactions, matters and things set forth in the indictment herein, and for and on account of which this

proceeding in prosecution was brought against this defendant.

VI. That at the close of the taking of the testimony at the said trial, the learned court was requested to instruct the jury to return a verdict in favor of the defendant upon the plea in bar interposed by him, which motion the court ought to have allowed, as uncontradicted evidence showed that this defendant had testified, and had produced evidence documentary under oath concerning transactions, matters and things set forth in the indictment herein, and for and on account of which this proceeding in prosecution was brought.

VII. That at the said trial, the learned court granted a motion made on behalf of the Government to direct the jury to return a verdict for the government, and against the defendant on the defendant's plea in bar.

VIII. That the said court erred in refusing to grant the motion of the defendant to instruct the jury to return a verdict in his favor, and further erred in directing the jury to return a verdict for the Government, and against the defendant on the defendant's plea in bar.

IX. That this defendant further represents that separate assignments of error are herewith submitted.

X. That your Honorable Court is asked to grant the Writ of Error in this case for the following reasons all of which are more particularly set forth in the Assignments of Error which are filed herewith and made a part hereof.

1. Because the construction and application to

the facts of this case of the Constitution of the United States is directly and necessarily involved in that by the said Constitution this defendant had a right of which he could not be lawfully deprived and which he could not waive, of a trial by jury as to the issues raised by his plea in bar, and by the action of the Court in instructing the jury to find for the Government and against the defendant on said plea in bar your petitioner was denied a trial by jury in violation of the Constitution.

2. The trial had upon said plea in bar and the decision, verdict and judgment of the Court thereon involves the true construction and application of the fifth amendment to the Constitution of the United States and the Statutes of the United States Act of Congress of February 25, 1903, Chapter 755, Section 1, as amended by the Act of June 30, 1906, Chapter 3920, which was duly enacted to give force and effect to said amendment to the Constitution.

3. That under the evidence had in this trial, the truth of which was not contradicted by the government it appeared that under and by virtue of the Act of Congress of February 25, 1903, as amended by the Act of June 30, 1906, Chapter 3920, commonly called the Immunity Statute, the government had no power to prosecute your petitioner with respect to the charges set forth in said indictment and the Court was without any jurisdiction to take cognizance of the prosecution, which had been by law withdrawn from the power both of the government and of the Court and the Court was therefore at all times from the finding of said indictment and is now wholly without

jurisdiction to take any further action in the said prosecution against your petitioner.

WHEREFORE, your petitioner Charles R. Heike, prays that a writ may be issued in his behalf from the Supreme Court of the United States for correction of the errrors so complained of; that a citation may be issued returnable within thirty days upon the entry of security in whatever sum may be directed; that supersedeas may be granted and a stay of execution of the proceedings in the Court below pending such writ of error or appeal, and that a transcript of the record, proceedings and papers in said matter duly authenticated may be sent to said Supreme Court of the United States.

Dated, New York, Feb. 21, 1910.

GEORGE S. GRAHAM,
Attorney for Petitioner,
Office & P. O. Address,
42 Broadway,
Borough of Manhattan,
New York City.

## Assignment of Errors.

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK—SECOND CIRCUIT.

UNITED STATES OF AMERICA

versus

CHARLES R. HEIKE impleaded with ERNEST W. GERBRACHT, JAMES W. BENDERNAGEL, HARRY W. WALKER, JEAN N. FOELKER and JAMES F. HALLIGAN, JR.,

Defendants.

Now comes the above named Charles R. Heike, by his counsel and files the following assignment of errors upon which he will rely upon his prosecution of the writ of error sued out by him in the above entitled cause to review the verdict and decision rendered and pronounced against him on the 14th day of February, 1910 as follows:

1. That said Court erred in sustaining the government's objection to the following question put to the defendant Heike:

> "Included in those tables (referring to the column headed 'Brooklyn H. & E.' showing the pounds of sugar melted in those several years) of each year are government weighings of sugar, are there not?"

2. That the said Court erred in sustaining the government's objection to the following question put to the defendant Heike:

> "Then I will change the form of it as to what makes up those totals; it is simply to ask whether the government weighings of sugar entered into that total."

3. That said Court erred in admitting in evidence over the objection of defendant's counsel (on the ground that it was immaterial and irrelevant, and that under the issues on trial, the only point was whether or not the defendant Heike complied with the subpœna served upon him and the results that arose therefrom), the testimony of the defendant Heike in reference to the knowledge which the defendant had of the investigations of the sugar frauds, and the following evidence:

> "Q. You know from your official position, the scope of the investigation and the prosecution which I (Henry L. Stimson) was conducting didn't you? A. Yes, I was present at the trial at that time, I knew what was going on.
>
> Q. And you were present at the trial in Brooklyn against Mr. Spitzer? A. Yes, I was called as an officer."
>
> Q. In November 1907 didn't you become aware of the fact that the Government claimed— A. I was there in our office.
>
> Q. Claimed to have discovered that there had been frauds committed on the docks of the Havemeyer & Elder Refinery? A. That was told in our office.
>
> Q. You became aware of that right off

didn't you? A. After the newspapers said so and Mr. Havemeyer discussed it.

Q. And you have been pretty familiar with the scope of the investigations ever since haven't you? A. No.

Q. You have been familiar with the scope of the trials? A. At the trial I was present, yes, I learned a great deal of the sugar business that time.

Q. Wherever the Government has got a claim you have come in contact with what the claim was haven't you, as far as it related to your company? A. A claim for duties? No, I don't think I knew; we have a custom house department and grocery department and what they do I don't know now.

Q. So far as your company was concerned my efforts culminated in a trial last February? A. Yes, I was there.

Q. And that trial was followed afterwards by a settlement with your company was it not? A. Yes.

Q. And you personally knew all about that settlement? A. Afterwards, yes; I didn't make it however.

Q. You made a statement to the press immediately afterwards over your own signature? A. It was signed by me, yes, but our attorneys wrote that.

Q. And I presume you knew what you were signing? A. Afterwards they explained it to me, yes.

Q. Well all I want to know is at the time when you were first called by Mr. Wise before the grand jury, last June, you had a

very distinct idea in your own head of what my prosecution was about didn't you? A. I didn't know what you did, sir.

Q. The settlement had already taken place? A. Yes, that I knew.

Q. The trial of last February had also taken place? A. Yes.

Q. That had lasted over four weeks and you were there nearly every day? A. Yes, I had to be there.

Q. So that so far as the gentlemen present in the court room can find out what a trial is about you had found out? A. I found out a great deal about sugar weighing I never knew before.

Q. And that trial related to these alleged frauds over in the Havemeyer & Elder docks? A. They did.

Q. And you had all of that? A. That knowledge I got at the trial.

Q. Before Mr. Wise ever called you before the grand jury? A. Yes, the trial happened before, yes.

Q. Now when he called you in June, the subpœna which you were summoned under gave you notice that it was in regard to the Sherman Law, didn't it, on its face? A. It did.

Q. And in addition to that you had pretty clear knowledge of what particular transaction under the Sherman Law Mr. Wise was investigating, didn't you? A. In June I think, yes.

Q. Again you had a very good reason to know there had been a civil trial that had attracted a good deal of attention on exactly

the same subject just before Mr. Wise called you, hadn't it? A. In June, yes.

Q. Your company had been sued by Mr. Earle of Philadelphia? A. Yes, that I knew.

* * *

Q. It was against your company? A. Yes, I knew that.

Q. And you knew in general that Mr. Earle was suing your company for damages occasioned by an alleged breach of the Sherman Anti Trust Law? A. Yes, I knew.

Q. Arising out of the claim that your company had closed up the Segal refinery in Philadelphia? A. So I understood.

Q. That in substance was your understanding? A. Yes.

Q. And you knew that Mr. Wise's prosecution was based upon the same alleged state of facts didn't you? A. I didn't know much about Mr. Wise's investigation at all, but I answered his subpœna and went and gave facts.

Q. Do you mean to say you didn't know what Mr. Wise was investigating about when he called for the Kissel checks? A. Well, after I delivered the checks, yes.

Q. You knew perfectly well what he was investigating? A. I guess I did.

Q. The subpœna on its face called for the transactions relating to that matter did it not? A. Yes it did.

Q. And these four checks that you produced yesterday were the checks which altogether constituted the loan for the $1,250,000 which your company gave to Kissel? A. Yes.

Q. For the purpose of going to Segal? A. I was demanded to bring it here and so I did; I didn't stop upon the propriety of asking them at all.

Q. You knew when you brought those checks what they related to? A. Yes, I did that, there is no doubt about it.

Q. And you notice in the subpœna that all of the letters and all of the minute books and all of the records are limited to that transaction, you know that don't you—the subpœna of June? A. I know they are limited but I was compelled to bring the books here; as a whole I remember it very well."

4. That said Court erred in admitting in evidence over the objection of the defendant's counsel (on the ground that the subpœna speak for themselves) testimony of defendant Heike that the subpœna served on him in June 1909 on their face called only for the papers which referred to Mr. Kissel, Mr. Segal and the Pennsylvania transaction.

5. That the Court erred in admitting in evidence over the objection of the defendant's counsel (on the ground that it was incompetent and irrelevant) the following testimony of the defendant Heike:

"Q. Now about those minute books you produced at the same time the minutes of the directors and the minutes of the Executive Committee? A. I did.

Q. Did you think there was anything in those minutes that tended to show that you were criminally connected with the sugar weighing frauds? A. No, because I had nothing to do with it; how could I think? That evidence did not exist.

Q. You have not pointed out yesterday or to-day anything in any of those books that you think related to the sugar weighing fraud, have you? A. No, not frauds, but sugar weighing yes."

6. That the said Court erred in admitting in evidence over the objection of the defendant's counsel (on the ground that it was incompetent, irrelevant and immaterial) the following testimony of defendant Heike:

"Q. And now that your recollection is refreshed, have you any doubt that you came there with a pretty clear knowledge of what Mr. Wise's December investigation was about, and that you came there prepared to furnish voluntarily certain information which you did produce there? A. I don't know how to say yes to this. I did not reflect on it at all.

Q. Didn't you understand that Mr. Wise was then engaged in an investigation under the Sherman law to see whether the American Sugar Refining Company as a corporation had not been guilty of monopolizing the trade in the United States in refining sugar by suppressing different refineries throughout the country? A. I never reflected upon it; I don't know. Whatever inference you may make, I did not think of it at all."

7. That said Court erred in admitting in evidence over the objection of the defendant's counsel (on the ground that it was incompetent and immaterial) the following testimony of the defendant Heike:

"Q. Now is it not a fact Mr. Heike that so

far as these weighing frauds of sugar which have been the subject matter of my prosecutions are concerned, the position which those companies has taken from the very beginning has been, that they were perfectly willing to have the government inspect their books and papers to your knowledge? A. Yes, I understood that."

8. The Court erred in admitting in evidence over the objection of defendant's counsel (on the ground that it was incompetent and immaterial) the following testimony of the defendant Heike:

"Q. On November 18, 1908, did you not give out the Havemeyer letter (showing paper)? A. I don't know; I know Mr. Havemeyer offered them the books and information. I don't know about what the New York Sun said in the morning."

9. That said Court erred in admitting in evidence over the objection of defendant's counsel (on the ground that it was irrelevant, incompetent and not pertinent to the issue), the following testimony of the defendant Heike:

"Q. Now with your memorandum refreshed by these different papers, can you not state whether or not it is a fact that in regard to these sugar weighing frauds, these two sugar companies have from the beginning with your concurrence, made public to the government all of their books and records? A. Yes, I knew of that, I sent it out to the stockholders; mailed it. I don't know anything about concurrence. Explain

what you mean by concurrence and I will tell you in a minute.

Q. I asked a question which you have not answered yet. (Question read with the addition of 'to your knowledge'.) A. Yes, to my knowledge.

Q. You said a moment ago this had been given out by you? A. Yes, made public.

Q. This has been made public by you I understand you to say? A. Yes, this statement; it was sent out by me, my orders to every stockholder."

10. That the Court erred in admitting in evidence over the objection of defendant's counsel on the ground that it was incompetent, immaterial and not pertinent to the issue, Plaintiff's Exhibit A, being a statement to the stockholders of the Company signed by the defendant Heike as Secretary to the Company.

11. That the said Court erred in admiting in evidence over the objection of defendant's counsel (as incompetent and immaterial, and not within the knowledge of the witness, and not properly proven or identified, or appearing to be a paper that was authentic) Government's Exhibit B, purporting to be a letter from H. O. Havemeyer, President of the American Sugar Refining Company to Hon. George B. Cortelyou, Secretary of the Company of the Treasury of the United States.

12. That the Court erred in refusing to strike out on motion of defendant's counsel, the testimony set forth in the preceding assignment on the ground that it had no relation to or connection with the prosecution under the Anti Trust law that gave rise to the plea of the defendant.

13. That said Court erred in admitting in evidence over the objection of defendant's counsel, the Government's Exhibit C, being a statement given to the representatives of the Press by the American Sugar Company, and given out by defendant Heike.

14. That the said court committed error in admitting in evidence over the objection of the defendant's counsel the following testimony of the defendant Heike:

> "Q. Now Mr. Heike when you went before the Grand Jury, bearing in mind these different statements which I have called to your attention, at the time when you went before the Grand Jury in June and December, were you not well aware of the fact that your Company had offered its books and papers to the Government in these underweighing frauds? A. Yes, I knew that.
>
> Mr. Graham: I object to that, sir.
>
> The Court: It comes within the same ruling.
>
> Objection overruled. Exception."

15. That the said Court erred in admitting in evidence over the objection of the defendant's counsel (on the ground that it was irrelevant and immaterial, and that the witness was not required to give notice or claim of privilege), the following testimony of the defendant Heike:

> "Q. Now at any time during these proceedings in June or December or January, did you protest to Mr. Wise or to any of his assistants that any of these papers which you were producing, or any of these books, or any of your testimony would tend to show

or might tend to show that you personally were aware of or connected with any of the sugar weighing frauds. The question is just whether you did or did not make any such protest? A. I made no protest. * * *

Q. You made no protest whatever? A. None whatever.

Q. At any time at any of these Grand Jury hearings? A. No; I can say this, however—

Q. Nor to Mr. Wise?

The Witness: I knew in a general way that under this so-called Sherman Anti-trust Act, the witness would be immune; I could not think, however, of an occasion for using it.

By Mr. Stimson:

Q. By that, you think you did not have any occasion for using it then at any of these times? A. Well, I had done no wrong, and I did not see any reason why I should need it."

16. That said Court erred in admitting in evidence over the objection of defendant's counsel (on the ground that it was immaterial and not a waiver of defendant's right to immunity) the following testimony of the defendant Heike:

"Q. Is it not a fact that you had given out information as to the office which you hold to a great many different books and papers of publicity in the City? A. Undoubtedly yes, I never denied I was Secretary and Treasurer."

17. That said Court erred in admitting in evi-

dence over the objection of defendant's counsel (on the ground that it was incompetent, immaterial and irrelevant) the following testimony of defendant Heike:

> "Q. I want to know in that same connection whether it is not a fact that in addition to the ways in which that fact was a matter of record here in this City, whether your Company was not in the habit of making regular sworn reports, under the laws of the different States in which reports your name appeared as a Secretary and Treasurer of the above Company? A. No. In New Jersey we made a report; we made none in New York.
>
> Q. How about Massachusetts (showing the paper) is not that a Massachusetts report? A. Yes.
>
> Q. Does not that give your name and office? A. Yes, Secretary.
>
> Q. The New Jersey Company? A. Yes.
>
> Q. That is the one of which you are Secretary? A. Yes, sir."

18. That said Court erred in admitting in evidence over the objection of defendant's counsel (on the ground that it called for a legal conclusion, and was incompetent and irrelevant, and that it made no difference what he thought under the law) the following testimony of the defendant Heike:

> "Q. Now, I ask you again when you produced these checks and these signatures, did you think at that time you were offering any evidence which might connect you with the sugar weighing frauds? A. No I did not think about it at all."

19. That said Court erred in admitting in evidence over the objection of defendant's counsel (on the ground that it was incompetent and irrelevant, and that what took place in another trial is not connected with the questions of his immunity) the following testimony of the defendant Heike:

> "Q. Were not all those minute books put in evidence in this case here in that Earle suit? A. I don't believe they were, I don't think so.
>
> Q. I do not mean to make my question necessarily cover all of them, but were not some of them; a good many of them? A. I think I made some extracts or a reference in the minutes to that case, and furnished those; never the books as a whole; that is what I did, yes.
>
> Q. But you did furnish certain extracts from those books for the counsel in that case? A. Yes.
>
> Q. Were those extracts relating to those Earle transactions? A. Yes, precisely.
>
> Q. Were they substantially the same ones that were called for in this subpœna which you obeyed? A. The first time? Yes, except you did call for the books."

20. That said Court committed error in admitting in evidence over the objection of defendant's counsel the following testimony of the defendant Heike:

> "Q. In other works Mr. Heike is there anything here in any of these papers that at the time you sat in the grand jury room, in your mind it seemed to you to offer evidence

connecting you in any way with any of the underweighing frauds charged against your Company? A. I did not think of underweighing frauds at all when I handed these papers, or any frauds of any kind, weighing or otherwise."

Q. At any rate that thought was not in your head at all? A. At that time no; not then."

21. That said Court erred in admitting in evidence over the objection of defendant's counsel the following testimony of the defendant Heike:

"Q. At the time you offered that (Defendant's Exhibit 25) to Mr. Wise, did you think that that in any way connected you with the sugar weighing frauds? A. No, I did not.

Q. I show you all of these which I have, if not mistaken, are the ones which you presented, being Exhibits 19, 22, 29, 30, 26, 27, 18, 31 and 34, look at them? A. Yes.

Q. Those are the papers which you offered before the December and January Grand Juries? A. Yes, I did.

Q. At the time you say you offered those papers did you think that any one of them tended to show you were connected with the sugar weighing frauds? A. It never occurred to my mind. I had nothing to do with frauds, so I did not connect myself with it.

Q. It never occurred to your mind? A. No. I could not connect myself with anything that did not exist."

22. That the said Court erred in admitting in evidence over the objection of defendant's counsel

(on the ground that it was incompetent) the two letters from the defendant Heike to Henry A. Wise, United States District Attorney for the Southern District of New York (Government's Exhibits D and E).

23. That the said Court erred in admitting in evidence over the objection of defendant's counsel (on the ground that it was incompetent, irrelevant and immaterial, and that the minutes taken before the Grand Jury were privileged) the following testimony of the defendant Heike:

> "Q. Just look in that (showing books of the grand jury minutes) do you find any other request than that in those minutes? A. My memory is that I was asked to produce the actual meltings, which I produced with some difficulty."

24. That the Court erred in admitting in evidence over the objection of defendant's counsel (on the ground that it was not sufficiently broad in its terms to authorize Mr. Stimson, the appointee under it, to sign the pleadings in this case and that it was incompetent, irrelevant and immaterial, and that no proper foundation had been laid for its introduction) Government's Exhibit J, being the appointment of the commission of Henry L. Stimson, as special assistant from the Attorney General.

25. That the said Court erred in admitting in evidence over the objection of defendant's counsel, the statement given to the Press by the defendant Heike on or about April 29th, 1909 (Government's Exhibit J).

26. That the said Court erred in refusing to grant

the motion of the defendant to instruct the jury to return a verdict in favor of the defendant upon the plea in bar interposed by him.

27. That said Court committed error in directing the jury to return a verdict for the Government, and against the defendant on the defendant's plea in bar.

28. That the said Court committed error in not submitting the issues raised by the pleadings herein to the jury and that in so doing he deprived said defendant of his right to trial by jury in violation of his rights, privileges and immunities under the constitution of the United States.

29. That the said Court erred in that its decision and direction of a verdict in favor of the government and against this defendant violated the true construction and application of the fifth amendment to the Constitution of the United States and the Statute of the United States of February 25, 1903, Chapter 755, Section 1, as amended by the Act of Congress of June 30, 1906, Chapter 3920, which was duly enacted to give force and effect to said amendment to the Constitution.

30. That said Court erred in its decision and direction of the verdict in favor of the government and against this defendant in that under the evidence had on the trial of the issues herein it appeared without contradiction that under and by virtue of the Act of Congress of February 25, 1903, Chapter 755, Section 1, as amended by the Act of Congress of June 30, 1906, Chapter 3920, commonly known as the Immunity Statute the government had no power to presecute said defendant with respect to the charges set forth in said indictment

and said Circuit Court was without any jurisdiction to take cognizance of said prosecution which said prosecution had been by law withdrawn from the power either of the government or of the Court and the Court was therefore at all times from the finding of said indictment and is now wholly without jurisdiction to take any further action in the said prosecution against said defendant.

WHEREFORE, the said Charles R. Heike prays that the said decision and verdict of said Circuit Court of the United States for the Southern District of New York in the above entitled action for the errors aforesaid, and for other errors in the record and proceedings in said matter, and in the judgment and sentence aforesaid, may be reversed, and that said Court may grant a new trial to the defendant Charles R. Heike.

Dated, New York, February 21, 1910.

GEORGE S. GRAHAM,
Attorney for Defendant,
Charles R. Heike,
42 Broadway,
Borough of Manhattan,
New York City.

## Order Allowing Writ of Error.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA,

OCTOBER TERM, 1909.

UNITED STATES OF AMERICA

versus

CHARLES R. HEIKE, impleaded with ERNEST W. GERBRACHT, JAMES W. BENDERNAGEL, HARRY W. WALKER, JEAN N. FOELKER, and JAMES F. HALLIGAN, JR.,

Defendants.

The above named Charles R. Heike, having prayed for the allowance of a writ of error to the Supreme Court of the United States from the decision and verdict heretofore made and filed in the above entitled matter, and that pending said writ of error further proceedings in said case and under said decision and verdict may be stayed by the order of this Court,

It is now therefore ordered that said writ of error of said Charles R. Heike be and the same is hereby allowed, and that further proceedings in said case and under said decision and verdict be and the same are hereby stayed pending said writ of error.

HORACE H. LURTON,
Justice of Supreme Court.

## Writ of Error.

UNITED STATES OF AMERICA, SS.

THE PRESIDENT OF THE UNITED STATES.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York,

GREETING:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between The United States of America, plaintiff and Charles R. Heike, impleaded with Ernest W. Gerbracht, James W. Bendernagel, Harry W. Walker, Jean N. Foelker, and James F. Halligan, Jr., defendants, a manifest error hath happened, to the great damage of the said Charles R. Heike, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the SUPREME COURT OF THE UNITED STATES, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what

of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable MELVILLE W. FULLER, Chief Justice of the [SEAL.] United States, the 25th day of February, in the year of our Lord one thousand nine hundred and ten.

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court
of the United States.

Allowed by

(Signed) HORACE L. LURTON,
Associate Justice of the Supreme Court
of the United States.

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**Citation.**

UNITED STATES OF AMERICA, ss:

To The United States

GREETING:

You are hereby cited and admonished to be and appear at a SUPREME COURT OF THE UNITED STATES, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York wherein Charles R. Heike is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable HORACE H. LUR-

TON, Associate Justice of the Supreme Court of the United States, this twenty-fifth day of February, in the year of our Lord one thousand nine hundred and ten.

(Signed) HORACE H. LURTON,
Associate Justice of the Supreme
Court of the United States.

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## EXHIBIT B.

### Notice of Motion to Dismiss Writ, &c.

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

CHARLES R. HEIKE,
Plaintiff-in-Error,

against

THE UNITED STATES,
Defendant-in-Error.

Sir:

TAKE NOTICE that upon the plea and replication herein, the opinion of the Court and verdict thereupon and the plea of not guilty thereafter entered by the plaintiff-in-error upon the annexed affidavit of Henry L. Stimson, as well as upon all the proceedings herein, I shall move the Supreme Court, at the opening thereof on Monday, February 28th, 1910, or as soon thereafter as counsel can be heard, that the writ of error granted herein on February 25th, 1910, be dismissed and the supersedeas also granted vacated

and set aside, and for such other and further relief in the premises as may be just.

Yours very truly,
GEORGE W. WICKERSHAM,
Attorney General.

February 25, 1910.

To
JOHN B. STANCHFIELD, Esq.,
Attorney for the Plaintiff-in-Error,
5 Nassau Street,
New York City.

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**Affidavit on Motion to Dismiss Writ.**

UNITED STATES OF AMERICA,

In the Supreme Court.

Charles R. Heike,
Plaintiff-in-Error,

against

The United States,
Defendant-in-Error.

United States of America,
Southern District of New York, } ss.:

HENRY L. STIMSON, being duly sworn, deposes and says: I am Special Assistant to the Attorney General and represent the United States in this Prosecution. The indictment herein was found on January 14th, 1910. It contained six counts charging offences under Section 5445 and

Section 9 of the Customs Administrative Act and also Section 5440, the General Conspiracy Law. On January 24th, 1910, the defendant Heike filed his plea herein claiming immunity; on February 1st, 1910, the United States filed a replication traversing the said plea.

On February 10th, 1910, the issues thus raised were brought on for trial before Judge Martin and a jury sitting in the Circuit Counrt for the Southern District of New York. After testimony had been taken the defendant Heike moved for the direction of a verdict in favor of the defendant upon the plea and the government moved the Court for the direction of a verdict in favor of the United States upon the plea and replication. After hearing argument the Court directed a verdict upon the issues raised by the plea and replication in favor of the government.

The stenographer's minutes record the transaction as follows:

> "Mr. Stanchfield: The defendant excepts if your Honor please to your refusal to grant a motion or to instruct the jury to return a verdict sustaining the immunity plea upon the ground that the evidence warrants it.
>
> The Court: The defendant excepts to the motion made for a verdict and excepts to the Court's granting a motion on the part of the government?
>
> Mr. Stanchfield: Yes, sir; and I was about to say that we except to your granting the motion of the counsel for the government against the plea; and upon the

general issues the defendant, your Honor, if you please, pleads not guilty.

Mr. Stimson: I was going to suggest my friend's plea as premature. Has your Honor yet directed a verdict?

The Court: Well, he understands so.

Mr. Stanchfield: I have not heard the jury render any verdict of the Court yet.

(The foreman of the jury signed a written verdict pursuant to directions of the Court.)

Mr. Stimson: I am going to ask whether the defendant has any further motions before the motion for sentence.

Mr. Stanchfield: We have no motions; we plead not guilty to the indictment." (S. M., pp. 316-317.)

Thereupon the Court asked the government whether any objection was made to the allowance of this plea and Mr. Stimson for the government replied that while he considered that the matter lay in the discretion of the Court, under the circumstances of the case the government would not oppose the granting of this privilege of pleading over if the Court in its discretion took the same view. Thereupon the Court stated that the government not opposing it, would accept the plea and upon the motion of the government set the case for trial on Tuesday, March 1st, 1910, at 10:30 o'clock A. M. No objection whatever to this was made by the defendant or his counsel.

The indictment herein names five other persons as co-defendants with the defendant Heike. All of these defendants have pleaded not guilty and the case as against them stands for trial also on

March 1st, 1910, at the same time. The case is a very long and complicated one and its trial will occupy at least a month of the Court's time.

The calendars of the Circuit Court in the Southern District of New York are notoriously congested. In fact the present case has been set specially for trial before Judge Martin of the Vermont District on account of this condition of the calendar and on account of the engagements of the New York Judges. It would involve a complete derangement of the sessions of the Court if this case were now compelled to be adjourned for any considerable period or if by a severance it was made necessary to try these defendants separately.

HENRY L. STIMSON.

Sworn to before me this 25th day of February, 1910.

William J. Kirby,
Notary Public,
N. Y. County.

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**Exhibit C.**

I, JOHN A. SHIELDS, Clerk of the United States Circuit Court for the Southern District of New York, DO HEREBY CERTIFY, that it has not been the custom to enter formal judgments in criminal cases tried before a jury in the Circuit Court of the United States for the Southern District of New York, nor have I ever known a formal judgment in a criminal case tried before a jury to be entered. A record such as was furnished by me in the case of Charles R. Heike, Plaintiff in Error, vs. The United States, Defendant in Error, and

appearing at pages 18, 19 and 20 of the motion papers to dismiss the writ of error herein is a true illustration of the form and manner in which docket entries are made in criminal causes.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the seal of the said Circuit Court at the City of New York, in the Second Circuit, this fourth day of March in the year of our Lord One Thousand Nine Hundred and Ten, and of the Independence of the United States of America the One Hundred and Thirty-fourth.

(Sgd) JOHN A. SHIELDS,
(Seal of Court) Clerk.

# In the Supreme Court of the United States.

CHARLES R. HEIKE,
Plaintiff-in-Error,

AGAINST

THE UNITED STATES.

## MEMORANDUM OF GOVERNMENT ON MOTION TO VACATE ORDER ALLOWING WRIT OF ERROR AND STAY OF PROCEEDINGS.

### First.

*Of course writ of error will not lie from a judgment unless it is final.*

*McLish vs. Roff*, 141 U. S., 661.
*Bowker vs. United States*, 186 U. S., 135.

### Second.

*The direction of the verdict against the defendant Heike on his plea of immunity was not a final judgment.*

The record shows that after this direction of a verdict the District Attorney offered to move for a final judgment in the shape of a sentence, but that, on the defendant's urgent request, no such judgment was entered, and instead he was allowed to plead over "not guilty." On this plea of "not guilty" the general issue to the indictment was raised, and the determination of that issue still awaits trial. The only way in which the decision of the Circuit Court on the immunity issue can be reviewed is in the ordinary

method of an appeal from the final judgment after one is rendered upon this issue of "not guilty." Defendant's counsel during the trial before Judge MARTIN admitted this in their argument (Government's motion, p. 4).

**Third.**

*The immunity statute presents no special or novel features which sanction an interlocutory appeal in violation of this general rule as to appeals.*

Its phraseology providing that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence," etc., etc., does not introduce any such exception. A similar contention to the one now made by plaintiff in error was presented to this Court in *Brown vs. Walker*, 161 U. S., at page 608, and was there promptly refuted:

> The same answer may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. *This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution and put to the expense of defending himself, but unless such prosecution be malicious he is remediless except so far as a recovery of costs may partially indemnify him.*

This language of the Immunity Statute is precisely similar to the language of the Statute of Limitations providing that "no person shall be prosecuted, tried or punished for any offense, etc., unless the indictment is found, etc., within three years next after such offense shall have been committed" (R. S., Section 1044). So far as we know, it has never been contended that there is a right of direct

review of a decision overruling a plea in bar of the Statute of Limitations, after the defendant had pleaded over and while the case was still pending on the general issue. There is no such case in the books. On the contrary, the practice seems to be uniform that the bar of the Statute of Limitations is reviewed only *after final judgment* of conviction (*e. g., Bradford vs. United States,* 152 Fed., 617; *Greene vs. United States,* 154 Fed., 401, cert. den., 207 U. S., 596; *Streep vs. United States,* 160 U. S., 128).

The same is true of the practice upon the plea of double jeopardy under the Fifth Amendment that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The language of this amendment would seem to be far stronger than the Immunity Statute in the direction of protecting the defendant from a subsequent prosecution; yet when that defense is pleaded and overruled defendant must await final conviction before he can review such a decision.

These are analogous instances of the jealous enforcement by this Court of the salutary rule stated in *McLish vs. Roff (supra):*

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error * * * have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.

## Fourth.

*The record shows that no writ of error would lie in any event to this Court, because no constitutional or other question under the Fifth Section of the Circuit Courts of Appeals Act exists.*

The only question raised by Heike's plea was whether he was being prosecuted "on account of any transaction,

matter or thing concerning which " he had testified or produced evidence before the Grand Jury. This is a pure question of fact, and the attempt to distort it into a constitutional question is palpable.

The sufficiency of the Immunity Statute to meet the constitutional requirement has been upheld again and again (*Brown vs. Walker, supra; Inter-State Commerce Commission vs. Baird*, 194 U. S., 25; *Hale vs. Henkle*, 201 U. S., 43; *Nelson vs. United States*, 201 U. S., 92, 116; *Jack vs. Kansas*, 199 U. S., 372). And where this Court has already upheld the constitutionality of a statute it cannot again be made the basis of a writ of error upon the ground of a constitutional question (*King vs. West Virginia*, 216 U. S., 92; *Harris vs. Rosenberger*, 145 Fed., 449; cert. den., 203 U. S., 591).

But even if Heike had sought again to raise this question, he could only do it by a refusal to answer before the Grand Jury and subjecting himself to compulsory process of the Court. The record shows that he took no objection whatever, but answered freely all questions asked. Therefore, even if he was entitled to refuse to answer any individual question on the ground that it was not protected by the Immunity Statute, he has failed to raise that issue for this Court. This Court has uniformly held that after evidence has passed into the hands of the Government which might have been withheld, it is too late to raise the constitutional right of a witness to withhold it (*Adams vs. New York*, 192 U. S., 585; *Burrell vs. Montana*, 194 U. S., 572; *cf. Pettibone vs. Nichols*, 203 U. S., 192).

Respectfully submitted,

LLOYD W. BOWERS,
Solicitor General.

March, 1910.

IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1909.

| | |
|---|---|
| CHARLES R. HEIKE, Plaintiff in Error, vs. THE UNITED STATES. | No. 849. |

WRIT OF ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO DISMISS WRIT OF ERROR ON THE GROUND THAT THE JUDGMENT IN SAID CIRCUIT COURT, TO REVIEW WHICH THE SAID WRIT OF ERROR IS PROSECUTED, IS NOT A FINAL JUDGMENT, AND THAT THEREFORE THE COURT HAS NO JURISDICTION TO ENTERTAIN SAID WRIT.

## BRIEF IN OPPOSITION TO MOTION.

The sole issue raised by the motion and the moving papers is thus stated by the Government in its brief:

> *"Is a judgment entered upon a verdict against a plea of immunity to an indictment, with leave to the defendant to plead over, a final judgment reviewable by this Court, where the defendant does in fact plead over, 'not guilty,' and the issue on such plea of 'not guilty' is still undetermined and awaiting trial?"*

## Statement of the Case.

The defendant, with five others, was indicted on January 14, 1910, for violations of the customs law in connection with the fraudulent importation of dutiable sugar, and also for conspiracy.

Charles R. Heike, who was the secretary and treasurer of the American Sugar Refining Company, is charged with complicity in the weighing frauds on the docks at the Havemeyer & Elder Refinery in Brooklyn, New York, which was owned by said corporation. Heike was not a director, nor clothed with any power other than that which would belong to him as secretary and treasurer.

He had been summoned before three Grand Juries, and examined at great length under oath, besides producing a large amount of documentary evidence. Among other things, he was obliged to produce, as a witness, subpœnaed, testifying under oath, the record showing his official position, the organization of the corporation in question, the ownership of the Havemeyer & Elder refinery, and also to furnish (covering a period of ten years, and including the period covered by the indictment) the actual amount of sugar per year melted in this refinery. This statement of the meltings, together with the customs house weights already in the possession of the Government, would show exactly the difference or the quantity of sugar upon which duty had not been paid.

All of these facts are intimately associated with, and form part of, the proof upon which the Government relies to convict under this indictment.

The proceedings before the Grand Jury in which Charles R. Heike gave testimony and produced, under oath, documents and papers, were investigations of alleged violations of the Sherman Anti-Trust Law.

The defendant Heike filed a special plea claiming immunity under the Act of February 25, 1903 (32 Stat., 904, Chapter 755) as amended by the Act of June 30, 1906 (34 Stat., 798), on the ground that he had testified and given evidence before Grand Juries in investigations of alleged violations of the Sherman Anti-Trust Law, and that the

indictment in question was a prosecution covering the transaction, matter or thing concerning which he testified and produced evidence, documentary and otherwise, in said proceeding.

To this plea the Government filed a replication, and the defendant rejoined, whereupon an issue was raised, which was brought to trial before Judge MARTIN and a jury in the Circuit Court of the United States for the Southern District of New York on February 10, 1910. Upon the conclusion of the taking of testimony, upon a motion made by the Government, the Court directed a verdict to be entered, and the following verdict was thereupon rendered by the jury:

> "We, the jury upon this issue before us raised by the special plea in bar, the replication and rejoinder, find for the United States."

Under this verdict, in obedience to a mandamus issued by this honorable court, Judge MARTIN entered the following:

> "Judgment be and hereby is entered for the United States upon the verdict, with leave to defendant to plead over as of February 14, 1910, *nunc pro tunc.*"

The Act of Congress under which the immunity plea is filed and immunity claimed, reads as follows:

> "*No person shall be prosecuted*, or be subjected to any penalty or forfeiture, for, or on account of, any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said acts." (The words "said acts" refer to the Sherman Anti-Trust and Interstate Commerce Acts.)

## ARGUMENT.

### I.

**The Government contends that:**

> **"On its face, the judgment in the present case is merely an interlocutory ruling, and not a final judgment. It is not the 'final determination of the case' against the defendant."**

This proposition is inaccurate, in view of the rulings of this Court, and does not properly state what the record discloses.

A judgment, to be appealable, need not be a judgment that finally determines *the case*. If the judgment from which an appeal is taken, settles a collateral matter distinct from the general subject of the litigation, it is a final, appealable judgment within the law. In other words, where the end reached is final in its nature, where the end reached closes up one matter or subject, and determines that matter or subject, the matter or subject being a thing that exists separate and apart from and not involved in the general issue, standing by itself, then this constitutes an appealable order.

It is true, as decided in McLish vs. Roff (141 U. S., 661) and Bowker vs. United States (186 U. S., 135, 138), quoted by the Government, that appeals direct to the Supreme Court under the provisions of Section 5 of the Act of March 3, 1891, may be taken only from a final judgment. This, however, leaves the question to be determined as to what constitutes a final judgment, and it is earnestly contended that the judgment entered upon the verdict of the jury in the case in question is a final judgment.

The immunity statute provides: "*No person shall be prosecuted*," etc.; and the Government now asks this Court to dismiss this writ of error upon the ground that the judgment in the Court below is not final, in the face of this plain provision of the statute, and contends that on the general issue raised by the plea of "not guilty" the defendant may be acquitted or a *nolle prosequi* may be entered,

or other things intervene to stop the prosecution, and to make the question of immunity, as they claim, purely academic. But this is not the fact, for, unless this Court entertains this writ of error, the defendant will be denied an immunity from prosecution, given to him under the statute in lieu of the constitutional privelege and safeguard against self-accusation embodied in the Fifth Amendment; and no subsequent action of this Court, after either conviction or acquittal, can repair the wrong thus done. *His right to immunity from "prosecution" must be vindicated under this writ of error, or the immunity from "prosecution" will be forever lost.*

The question presented in this case is an absolutely new one. It has not been decided by this tribunal of last resort, nor considered, before this time.

It is admitted that a judgment of *respondeat ouster* is usually not a final or appealable order, but the judgment in this case is not a judgment of *respondeat ouster*. While leave to plead over was given, the judgment was entered upon the verdict which dismissed the plea of immunity and ended, finally, so far as compliance with the statute is concerned, this question against the plaintiff in error.

There is no analogy between the present case and those in which *autrefois acquit, autrefois convict*, former jeopardy, senatorial privilege, and the like, are involved.

*Mr. Justice Blatchford*, in *Counselman vs. Hitchcock* (142 U. S., 547) said :

> "No statute which leaves the party or witness *subject to prosecution* after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford *absolute immunity against future prosecution* for the offense to which the question relates."

No substitute for the protection contemplated by the amendment would be sufficient were its operation less ex-

tensive and efficient. The amendment enabled the witness to lift the shield of silence between himself and prosecution, or the use of anything sought to be extracted from him against himself in any criminal proceeding. The privilege constituted a protection *in advance*. The substitute provided by the statute must equal the privilege that has been taken away, and furnish protection from prosecution in advance.

Mr. Justice SHIRAS, delivering the dissenting opinion for himself and Mr. Justice GRAY and Mr. Justice WHITE, in *Brown vs. Walker* (161 U. S., 592), made the following comments upon the language of the substitute provided by the statute:

> "What, then, is meant by the clause in this act that '*no person shall be prosecuted* * * * ?' How possibly can effect be given to this provision, if taken literally? If a given person is charged with a wilful violation of the interstate commerce act, how can the prosecuting officers or the grand juries know whether he has been examined as a witness concerning the same matter before the commission or some court? Nor can the accused himself necessarily know what particular charge has been brought against him, until an indictment has been found. But when an indictment has been found, and the accused has been called upon to plead to it, he assuredly has been *prosecuted*. So that all that can be said is, that the witness is not protected, by the provision in question, from being prosecuted, but that he has been furnished with a good plea to the indictment, which will secure his acquittal. But is that true? Not unless the plea is sustained by competent evidence. His condition, then, is that he has been prosecuted, been compelled, presumably, to furnish bail, and put to the trouble and expense of employing counsel and furnishing the evidence to make good his plea. It is no reply to this to say that his condition, in those respects, is no worse than that of any other innocent man who may be wrongfully charged. The latter has not been compelled, on penalty of fine and imprisonment, to disclose under oath facts which have furnished a clue to the offense with which he is charged.
>
> "Nor is it a matter of perfect assurance that a person who has compulsorily testified before the Commission, grand jury, or court, will be able, if

> subsequently indicted for some matter or thing concerning which he testified, to procure the evidence that will be necessary to maintain his plea. No provision is made in the law itself for the preservation of the evidence. Witnesses may die or become insane, and papers and records may be destroyed by accident or design."

While these reasons were urged as a basis of dissent from the view that the statute in question furnished an equal substitute for the privilege taken away, and the majority of the court held that the substitute was co-extensive with the privilege because it was an amnesty proclaimed in advance, it was a declaration that the person was innocent, and also a declaration that he should not be prosecuted, the views expressed by Justice SHIRAS are certainly potential arguments in favor of giving as full and complete effect as possible to the declaration that "no person shall be prosecuted," in view of the fact that it is a substitute for a constitutional privilege.

It may well be said that in the preliminary stages which must be taken in every criminal case, that is, the steps necessary to information or indictment, that this is prosecution, yet it is prosecution that is secret and to which the witness has no opportunity to take exception or reply until the action is made public and he is called upon to answer an indictment. It may be said that it is unavoidable, that so far the prosecution may go; but, when it is called to his attention and the opportunity is given to him to file his plea, raising the question of his immunity, surely then the prosecution should be arrested and every question relating to his plea of immunity should be determined finally and absolutely before he should be compelled to stand a trial. Any other view of the rule would be to make the substitute less extensive and unequal to the privilege that has been taken away, for it would permit the use of things which the witness might say or concerning which he might testify, against him in the trial, and this is a violation of the Nation's plighted word of honor as contained in this statute.

This Court, having declared that the immunity statute is constitutional, is all the more bound to see that the substitute which it provided shall not be a mockery and a snare,

but that it shall be given full force and effect. This may only be done when the words are used, "No person shall be prosecuted," by permitting a hearing and the determination of the validity of the immunity plea before the witness may be prosecuted.

What answer is it to say that when the cause is finally tried out on the general issue and verdict, judgment and sentence reached, that the defendant may have the privilege of appeal to the Circuit Court of Appeals to hear his cause, or, waiving this right, come to this tribunal on the constitutional question alone?

What though this Court should then see fit to reverse the court below and set aside the judgment. The witness has been deprived of some of the benefits of his constitutional privilege, for he has been subjected to prosecution; things said or testified to by him have been used against him; he is exposed to the peril, by the delay, of losing his witnesses and being unable to meet and answer the charges. Surely the inequality between the constitutional privilege and substitute, as thus administered, is so clear that it needs no further comment.

If the immunity statute is to be made effective for the purpose of its enactment, the right of the witness to have his plea heard and determined must be freely and fully accorded. Not only the Constitutional right taken away demands this, but the policy of making the legislation substituted for the constitutional provision effective, requires it.

Without the consciousness that his plea of immunity can be heard and settled finally before he is put upon trial for any offense with which he may be charged, the temptation of the witness to destroy documentary evidence, or, in anticipation of the subpœna, absent himself from the jurisdiction, is extremely great; and, indeed, the witness would be excusable for such a course if the interpretation contended for by the Government as the right interpretation of the immunity statute, which robs him of his constitutional privilege, were to be adopted and pronounced by this Court.

> "A moment's thought will show that a perfectly innocent person may expose himself to accusation,

and even condemnation, by being compelled to disclose facts and circumstances known only to himself, but which, when once disclosed, he may be entirely unable to explain as consistent with innocence.

"But surely no apology for the Constitution, as it exists, is called for."

*Mr. Justice Shiras, in Brown vs. Walker.*

How can the undeniable repugnancy that exists between the constitutional guaranty and the compulsory provisions of the Act of Congress be overcome by the proviso relieving the witness from prosecution and from any penalty or forfeiture "for or on account of any transaction, matter or thing, concerning which he may testiify or produce evidence," unless full force and effect be given to the words "*No person shall be prosecuted?*"

How can full force and effect be given these words unless the judgment on the plea of immunity be treated as a final and conclusive plea, and the party pleading it be permitted, in case his plea is erroneously treated from a constitutional view-point by the court below, to appeal to this high tribunal and have his rights ascertained and protected?

The majority opinion of this Court, in *Brwn vs. Walker*, declared:

> "The Act of Congress in question, securing to witnesses immunity from prosecution, is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon either in England or in this country."

And again:

> "While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity."

The suggestion made in the opinion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity, is perfectly sound and true, but

it should not be extended beyond what is literally said by the Court.

This argument of the Court is not a reason against the contention of the plaintiff in error, but, on the contrary, is the recognition of an unavoidable incident in granting the substitute for the constitutional privilege, and only goes to the extent that the witness who is compelled to answer may be put to the annoyance and expense *of pleading his immunity.* But it does not determine the graver question, Shall he be compelled to go further? Having pleaded his plea of immunity, and having suffered the wrong of this unavoidable annoyance and expense, should he not then be permitted, upon the judgment of the court below, treated as a final judgment, to appeal to this tribunal to have his constitutional right settled? There can be no argument advanced to sustain the idea of then subjecting him to further prosecution until his plea of immunity and constitutional right shall first be settled.

The argument derived from inconvenience to this Court by permitting the bringing up of such a class of cases is wholly unworthy of consideration as against the question of constitutional privilege, and personal right and liberty, involved in this case.

The record in this case discloses that the plea of immunity has been found against the accused, that the plea itself has been dismissed, and that the Court, in violation of the defendant's claim of immunity, has ordered the trial of the case to proceed, and that the defendant is now being prosecuted, in violation of the statute.

The order of the Court directing the plaintiff in error to go to trial on Tuesday, March 1, 1910, is a violation of the rights of the plaintiff in error as guaranteed to him by the immunity statutes, which distinctly say that

> "No person shall be *prosecuted*, or be subjected to any penalty or forfeiture, for, or on account of, any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under said acts."

The order to proceed to trial is a final and appealable order, in and of itself, under these circumstances, as much so as an order to punish a witness for contempt who declined to answer, under the privilege of the Constitution, before the immunity law became its substitute. The *equivalent* for an order to punish for contempt one who exercised the old constitutional privilege, exists in the order to proceed to trial, which is an order to "prosecute" in violation of the immunity of the statutes.

The record further discloses, as amended and corrected under the order of this Court, that the immunity plea has been finally disposed of, that judgment has been entered thereon, and that that part of this proceeding is ended and determined. In view of the plain direction of the statute, surely this separate and independent question has been finally determined, and the plaintiff in error is entitled to have his rights under his plea reviewed on this writ of error.

Under the language of the immunity statute, the person who brings himself within the provisions of that Act is thereafter to be free from prosecution. It is, therefore, a primary and preliminary question, which was raised at the earliest possible moment, and which must be definitively settled before there shall be any right to proceed upon the indictment with a prosecution of the person. If this plea is good, no court has the right to try him, and no prosecuting officer has the right to place him in jeopardy. If the trial should proceed, the party suffers an irreparable loss. That which the statute pledges in lieu of the Constitutional privilege under the Fifth Amendment is taken away. Should he be acquitted, nevertheless he has been placed in jeopardy, and this the law exempts him from. Should he be convicted, and afterwards a higher court decide that he was entitled to his immunity, then the man may be set free from a sentence; but that is not what the Nation has pledged in place of his Constitutional right, and, besides, he will have suffered the ignominy of trial, loss of liberty pending appeal, and the humiliation of sentence, when the law says "*he shall not be prosecuted.*" To permit the trial to proceed takes away that which never

can be restored. It robs him of that which the law intended should be his, and which no subsequent review at a later stage can possibly restore. In fact *he will have been compelled to testify against himself.*

## What Constitutes a Final Judgment or Decree Has often Been Discussed in our Federal Courts.

The rule as to what will constitute finality and give the appealable quality is alike in civil and criminal matters.

In the case of *Forgay and others vs. Conrad*, 47 U. S., 201, where a decree had been entered setting aside certain deeds of the defendants in suit, and directing the Master to proceed to take an account of the profits of the lands and slaves ordered to be delivered up, and directing that certain other matters should be retained for further decree in the premises, and an appeal was taken by two of the defendants in the suit to whom deeds of conveyance had been executed, and whose deeds were set aside as fraudulent, it was urged before the Supreme Court that the decree was not final. Chief Justice TANEY said:

> "Undoubtedly, it is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature."

Further on in the opinion, he says:

> "And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained

in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

It was, accordingly, held that the decree was a final one, from which an appeal would lie.

In the case of *Brush Electric Co. vs. Electric Improvement Co.*, 51 Fed. Rep., 557, where the Brush Electric Company had been joined in the proceeding without its consent, and a motion was made for the dismissal of the suit as to it, and a hearing was had on affidavits, and the Court overruled the motion to dismiss, whereupon an appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, that Court held that the order should be deemed a final one, from which an appeal would lie, saying that the matter presented for consideration was not one presented by the bill of complaint or sought to be determined by it.

In speaking of final decisions which determine all the questions raised on the face of the pleadings, it was said:

> "Considering the construction given by the Supreme Court to the terms 'final decisions,' 'judgments' or 'decrees,' we reach the conclusion that the term 'final decision' in said statute under consideration does not mean necessarily such decisions or decrees only which finally determine all the issues presented by the pleadings; that, while these are undoubtedly final decisions, the terms are not limited to them, but also apply to a final determination of a collateral matter distinct from the general subject of litigation, affecting only the parties to the particular controversy, and finally settles that controversy."

*The controversy in this case over the immunity of Charles R. Heike settles a collateral matter distinct from the general subject of the litigation.*

In *McGourkey vs. Toledo & Ohio Central Railway Co.*, 146 U. S., 536, there is a reference by Mr. Justice BROWN to a number of cases on the subject of what constitutes a final decree, and he uses this significant language:

> "This case and the other cases above referred to, certainly make it clear that a decision in any par-

> ular proceeding which disposes of the whole matter litigated in that proceeding and leaves nothing thereafter to be done except the ministerial act of executing it, is a final decree or final judgment in that proceeding, and one which may be reviewed on appeal or by writ of error."

Undoubtedly the verdict rendered in the case below and the dismissal of the plea of immunity, was a final one in the sense that it exhausted the power of the Court in the proceeding in which it had been made. Nothing was left but the execution of the ministerial duty of proceeding to trial, or proceeding to prosecute.

Whenever in a cause there is a determination of some question of right, a decision is final in the sense in which an appeal from it is permitted, if it decides and disposes of the whole merits of the case as between the parties on that issue.

It may be argued that the present case is ruled by the decision in the case of *Alexander vs. United States*, 201 U. S. Rep., page 117.

The two cases, however, are clearly distinguishable. An appeal was taken in the case referred to, from an order requiring a witness to answer certain questions and to produce certain books before a Commissioner. Mr. Justice McKenna, who delivered the opinion of the Court, adopted as the correct statement of the law on that subject the following extract from the opinion of Circuit Judge Vandeventer, as follows:

> "I am of opinion that the mere direction of the court to the witnesses to answer the questions put to them and to produce the written evidence in their possession is not a final decision; that it more appropriately is an interlocutory ruling or order in the principal suit, and that if the witnesses refuse to comply with it and the court then exercises its authority either to punish them or to coerce them into compliance that will give rise to another case or cases to which the witnesses will be parties on the one hand and the Government, as a sovereign, vindicating the dignity and authority of one of its courts, will be a party on the other hand. I have no doubt that a judgment adverse to the witness in that pro-

ceeding or case will be a final decision, and will be subject to review by writ of error, but not by appeal."

There is a line of cases upon this subject to the same effect. But all these cases clearly admit that if the court below should proceed *to compel the witness to answer*, that that would constitute a final, reviewable decision or judgment.

It will be observed that in the *Alexander case* the Court holds that when a final order is made against a witness in any proceeding which can be regarded as a suit or controversy to which he is a party, the right to appeal arises. That this is a correct statement of the court's views, is further shown by the manner in which Mr. Justice McKenna treats the previous decisions of the Court in the cases of *Interstate Commerce Commission vs. Brimson*, 154 U. S., 447, and *Interstate Commerce Commission vs. Baird*, 194 U. S., 25.

In the case at bar, the plaintiff in error, deprived of the constitutional defense provided by the Fifth Amendment, and covered by the substitute therefor in the immunity acts, claims that having given testimony which brought him within the provision of the latter acts, he ought not to be prosecuted. When his plea (assuming it to be well founded) is overruled by the Court, and he is ordered to proceed to trial, a state of affairs exists that is exactly analogous to the witness who, having been ordered to answer questions or produce documentary evidence, declines and is thereupon proceeded against by way of contempt.

The only thing that can follow in this case is prosecution; and the Court has ordered prosecution, and this stands in the place of the order of the Court directing punishment for contempt; so that this line of cases, while pointing out that the mere order of the Court to answer is not appealable, do also show that where a compulsory order is entered upon the defendant, that this is an appealable order. In this case, the dismissal of this plea, which the Judge concedes occurred at the trial after the verdict which he directed had been entered, and the order made upon plaintiff-in-error to proceed to trial on March first—

were steps which render this judgment final and conclusive upon the question of immunity. The question of immunity is not one involved in the general issue, which is that of guilty or not guilty of alleged customs frauds and conspiracy. It is a separate and distinct privilege with which he is clothed by virtue of this statute in lieu of his constitutional right; and the order to proceed to trial, which is an order to prosecute him, is an overriding of his constitutional privilege and his privilege under the immunity statute.

In the case of *Webster Coal & Coke Co.*, Petitioner vs *A. J. Cassatt et al.*, decided Decemb 2, 1907, number 283, October Term of that year, Chief Justice FULLER, delivering the opinion of the Court, while deciding in that case that the order appealed from was not a final or appealable order, did say, however, quoting what Mr. Justice BRADLEY said in *Williams vs. Morgan* (111 U. S., 684, 698), in holding a decree of intervention appealable, and citing many cases, that the order appealed from there was final in its nature, and was in a matter distinct from the general subject of litigation; a matter by itself, etc.

While the principle announced by Mr. Justice BRADLEY was applied in *Williams vs. Morgan* to a question of intervention, it is one of another line of cases which furnish an illustration of the principle that where a conclusion is reached which is final upon the independent fact involved, it is appealable. This principle is applicable generally, and has a bearing upon the question now being discussed. In other words, where the end reached is final in its nature, where the end reached closes up one matter or subject, and determines it, or a thing that exists separate and apart not involved in the general subject of the litigation, standing by itself, this constitutes an appealable order.

**Surely the plea of immunity, which is without analogy in the law, in that it provides that the subject of the immunity shall not be prosecuted, when it has been presented, considered, and overruled—certainly the overruling of it is a decision or a judgment final in its nature, conclusive upon that particular matter, and**

**it is a separate and distinct matter unrelated to the general issue in the litigation, which is, whether or not Charles R. Heike violated the customs laws of the United States, and committed an act of conspiracy.**

The suggestion in the Government's brief that the defendant might have allowed sentence to go against him without asking for any further opportunity of defense, and thus have created a final judgment, is wholly aside from the question under consideration. It is true that he might have done so; but why should he? The judgment entered upon his plea, and the order to proceed to trial, constitute as complete a violation of his rights as that which is reached where a witness is ordered to answer and, upon refusal, is committed for contempt.

The only consequence that can possibly happen in the law to the over-riding of the plea of immunity, is that the defendant shall be forced to trial. This is the penalty which the Act says shall not be inflicted upon a person who comes within its protection.

In two of the cases quoted by the Government, *Hazeltine vs. Bank* (183 U. S., 130) and *Schlosser vs. Hemphill* (198 U. S., 173), appeals had been taken from the judgment or decree of the highest court of a State reversing and remanding the cause for further proceedings; and they can have no application to the question under discussion.

The case of *California vs. San Pablo & Tulare Co.* (149 U. S., 308, 314) has no bearing upon this discussion.

Neither has the case of *Mills vs. Green* (159 U. S., 651); nor the case of *Kimball vs. Kimball* (174 U. S., 158).

In the *California* Case, the point decided is thus stated:

> "Where the cause of action between the parties to a writ of error pending in this court, has ceased to exist, the writ of error must be dismissed.
>
> "This court is not empowered to declare, for the government of future cases, principles or rules of law which cannot effect the result as to the thing in issue in the case before it."

In the case of *Mills vs. Green (supra)*, the point decided was as follows:

> "When, pending an appeal, an event occurs without the fault of either party, which renders it impossible for the court to grant any relief, it will dismiss the appeal; and such event, when not appearing in the record, may be proved by extrinsic evidence.
>
> "Where the whole object of the suit is to secure the right to vote at an election for delegates to a constitutional convention, and before the appeal to this court the day to vote has passed and the convention has assembled, the appeal will be dismissed.
>
> "This court takes judicial notice of the election of delegates and to the assembling of a state constitutional convention, on appeal from the decision of a lower Federal Court."

In the case of *Kimball vs. Kimball* (*supra*), the point decided was as follows:

> "Where one claiming to be the widow applied to be appointed administratrix of the estate of the deceased person and to revoke letters of administration issued to others, and the surrogate decided that she was not the widow of the intestate, and that her marriage was void by reason of the invalidity of a decree of divorce rendered in another state purporting to dissolve a former marriage, and the surrogate's decision was affirmed by the appellate courts of the state, a writ of error from this court to the state court will be dismissed, if a will of the deceased is subsequently found, which is admitted to probate, and letters testamentary issued thereon by the surrogate, and the letters of administration revoked, although such dismissal will leave plaintiff in error bound by the adjudication of the state courts that she was not the widow of the deceased."

And finally, as to the case of *Rankin vs. The State* (11 Wallace, 380), which is quoted by the Government to sustain the following text:

> "This court has expressly held that such a judgment of *respondeat ouster* is not a final judgment, and does not give the right to review to this court,"

it may be observed that the point decided in it was that a judgment of reversal, where the case must go back and be tried upon its merits, is not a final judgment of which this Court can take jurisdiction, and that the United States courts have only jurisdiction on questions brought up from the Supreme Court of any State upon final judgments.

In the *Rankin* case, which is regarded as the leading case by the Government, nothing more was decided by the Supreme Court of Tennessee than that the case should proceed and that the judgment on the plea of *autrefois acquit* was not final.

We make no such contention, and make no such claim with respect to that plea, or former jeopardy. All of these separate classes stand upon a totally different basis, for they each are absolutely and only defenses to be offered in the case, while the immunity plea is a bar to prosecution.

There is no precedent or authority on the question of the finality of the judgment with respect to a plea of immunity, and this case is not an authority against us.

## II.

**The Government contends that:**

> **"The immunity statute merely furnishes a defense to a defendant when put on trial. It does not give him freedom from actually being put on trial before a court of competent jurisdiction and according to due process of law."**

This proposition contains an erroneous conception of what the immunity statute stands for, and what it was intended to substitute.

The quotation from *Brown vs. Walker* does not militate against the view heretofore expressed concerning the true meaning and the correct construction to be given to the immunity plea.

In that case it was said: "As to the witness, the crime was deemed non-existent."

It was virtually an effort to place the man in the position of one who was innocent of such an offense, but it did this having always in mind that the witness had something more, a greater right, than the innocent person with whom he is compared. The witness, by virtue of the immunity statute, has been compelled to furnish evidence. The innocent man has not been put in any such position. Now, it is as against this compulsory giving up of information and fact and document that the provision stands, "*he shall not be prosecuted.*"

The question raised, therefore, is not one of defense, but one of absolute immunity. His position can never be placed on an equality absolutely with that of the innocent person. Having given up his documentary or oral testimony, he must, in substitution for the shield of silence that has been taken from him, be given the shield of protection against prosecution.

Neither is our contention antagonized by the further remarks contained in the majority opinion in *Brown vs. Walker*, to the effect that the witness may be subjected to the annoyance and expense of pleading his immunity, for the opinion goes no further than that.

Now, we have suffered the annoyance and expense of pleading immunity. Shall we be put to further annoyance and expense by being compelled to go through with a long and tedious trial, with all its perils? Shall we be subjected to being prosecuted? Shall we be further compelled, in violation of our constitutional privilege, for which the statute is a substitute, to have evidence given by us used against us on that trial?

The first annoyance to which the court refers, that of being prosecuted and compelled to plead the immunity, is perhaps unavoidable unless the statute were declared unconstitutional. But this detriment which the witness must suffer should not be extended and made to cover a complete prosecution, with all the attendant perils of loss of testimony, inability to get witnesses, ignominy, and the like.

We join issue with the Government in the proposition

announced that an immunized person has no greater rights than an innocent person. An immunized person has greater rights than an innocent person. The former has given up and surrendered something on the strength of the pledge of the United States contained in the statute, while the innocent person has given up nothing. The immunized person stands in a totally different relationship to the law and the question of prosecution from that which the innocent person occupies. It cannot be said of the innocent person that he shall not be prosecuted; while it has been said most emphatically that the immunized person shall not be prosecuted.

The witness was powerless, because the proceedings were secret by which the indictment was procured, to adopt the suggestion of the Government and sue out a writ of *habeas corpus*, or writ of prohibition; but once the indictment (which is the first notice of prosecution) is brought home to Mr. Heike, his plea of immunity—the substitute for his privileged silence—is presented as a bar to further prosecution, and he is entitled to have it considered and settled, not by a Judge who may unintentionally and unconsciously be permeated by the zeal which inspires the special prosecuting officers, but by the court of last resort, as it is a question of constitutional right.

The cases quoted from State courts, of course, are not authorities, but are presented as illustrative views, taken by others, of questions similar to the one involved in this case. In no one of these cases has the question now raised been presented and considered.

In *Rebstock vs. Superior Court of San Francisco* (146 Cal., 308), the only question before the court was whether or not a writ of prohibition should issue, and, on the ground that the court had jurisdiction to hear and determine the question of immunity, the writ was denied. This case is not an authority for anything else, even in California.

The cases quoted from Wisconsin do not raise this issue.

The reference to the case of *Regina vs. Skeen*, (8 Cox, C. C., 143, 153, etc.), is inapplicable, because in England there can be no question concerning the statute being in violation of the Constitution. The English Constitution is un-

written. No court is clothed with power to sit in judgment upon an Act of Parliament. The Parliament's powers are greater than those of Congress, and there can be no analogy between the English practice and our own.

## III.

**The Government further contends:**

> **"In this respect the defense of immunity is precisely like other defenses to criminal prosecutions afforded by the Constitution and the statutes. The overruling of pleas to such defenses does not give rise to final judgments appealable instanter, etc."**

The plaintiff in error replies that none of the cases referred to under this heading are analagous—and concedes it to be the law that such defenses as "statutes of limitation"; "double jeopardy"; "*autrefoir acquit*," etc: are all ones which purely and tenchnically are *defenses*.

They differ from the immunity plea most essentially. Not one of them is a *substitute* for a *Constitutional privilege* taken away. While some of them are constitutional rights, they in their very nature are only defenses.

The constitutional privilege was a defense or shield against any use of what the witness might testify to being made against him. It prevented prosecution. The immunity plea must do the like. The substitute must equal the privilege taken. The Immunity Statute is more than a pardon. While called a statute of amnesty in Brown vs. Walker, it is this and more.

Chief Justice MARSHALL said in *U. S. vs. Wilson*, 7 Peters, 160, after quoting Blackstone, Vol. 4, Page 401, as follows:

> "A pardon by Act of Parliament is more beneficial than by the King's charter; for a man is not bound to plead it, but the Court must *ex-officio* take notice of it; neither can he lose the benefit of it by his own

laches or negligence as he may of a King's charter or pardon.

"The reason why a court must *ex-officio* take notice of a pardon by Act of Parliament is that it is considered as a public law; having the same effect on the case, as if the general law punishing the offense had been repealed or annulled."

At the foundation of our Government what had only grown up by permission of the Courts in England in opposition to the despised inquisitorial methods of the Continent, somewhat followed in the early days of England, was written into the fundamental law—and made a constitutional guarantee and high privilege. The immunity statute, the substitute for this high privilege, was passed. The action of Congress in eliminating the fifth amendment was jealously regarded by the community and by this Court. Only after a law was framed that seemed to be co-extentive with the privilege taken, was the sanction of this Court placed upon the action of Congress. In doing so they declared it to be a General Amnesty. A pardon by Act of Parliament, so to speak. A law which annuled or repealed the law under which any prosecution was contemplated against the witness claiming its benefits. An Act which the Court must notice *ex-officio*, and the accused cannot be deprived of by his own laches or negligence. An enactment which set up the shield "no prosecution" for the shield of "silence," which itself prevented prosecution. How can any analogy be drawn between a statute of limitations and this law; or between the plea of immunity and the plea of *autrefois acquit* or convict, former jeopardy and the like? The latter are defenses, but in the case of the former the "crime is non-existent," the law under which it is to be tried and punished is as to it and the accused witness repealed or annuled.

This immunity is more and greater than a Parliamentary pardon.

The only way in which the immunity of the Statute can be made at all equal to the immunity of the Constitution is by regarding the judgment on this plea as final, and permitting the accused to have his right to immunity finally settled before any prosecution is permitted.

The preliminary step of finding an indictment is unavoidable, but when this comes to the notice of the accused and he pleads his immunity, there is and can be no reason in law or morals why he should not have the prosecution arrested and stayed until the Court of last resort has determined whether or not he is immune.

The appeal to prejudice by the Government that to so hold might increase the business of this Court is an unworthy and base suggestion. We feel assured that where there is a duty to hear and determine, this Court will faithfully and fully protect the rights and liberty of every citizen entitled to be heard, no matter how the business of the Court may be affected.

The case of "double jeopardy" or more strictly "former acquittal" cited by the Government does not decide this question. While it is true that in that case (*Rankin vs. The State*, 11 Wall., 380) it was ruled that the reversal of the judgment by the Supreme Court of Tennessee with leave to plead over did not constitute a final judgment, yet that case furnishes no precedent for the present. The former acquittal by the Court Martial was only a defense, and the facts connected with that acquittal might have to be inquired of on the trial of the main issue, and this and kindred cases are all subject to review at the *end of the case*, without doing any wrong to the accused or depriving him of a constitutional right, or rendering a substitute therefor unequal and unconstitutional.

## IV.

### The reference to the Criminal Appeals Act has no relevancy.

The point decided in *U. S. vs. Bitty*, 208 U. S., 393, was that this act was constitutional.

No one disputes for a moment the soundness of the statement that

> "Congress was not required by the constitution to grant to an accused the privilege of bringing here,

upon the overruling of a demurrer to the indictment, and before the final determination of the case against him, the question of the sufficiency of the indictment."

This case has no bearing upon the present one, if our contention, heretofore stated, be sound. We need no Act of Congress to enable us to appeal in this case, if, in the view of the Court, the judgment upon the immunity plea is final.

## V.

**The fifth contention of the Government is unsound, because, as has already been pointed out, the Plaintiff-in-error does suffer a grievous hardship if he be compelled to await the end of the case below before having his rights under the immunity plea reviewed.**

To say that a Court of competent jurisdiction has, "after a full trial, lasting three days, adjudged that the Plaintiff-in-error's claim of immunity is not well founded," and that therefore he is not being prosecuted "on account of any transaction, matter or thing" concerning which he testified, is to beg the question. This statement assumes that the Court below committed no error. It likewise assumes that the finding is correct. Both of which propositions are denied. The Court below invaded our constitutional rights in two or more ways in reaching that conclusion. He arbitrarily *directed* verdict against Mr. Heike. It does not matter what the practice has been for nearly a century past with respect to the right of the accused to appeal. That practice has ceased; it is no longer the law.

As well might it be argued that because for centuries "Wager of battle," the "Water test" and "hot irons" were used to decide the guilt or innocence of the accused, that therefore the same practices should be resorted to to-day. The humanity of the law has made new safe-

guards and protections. These must now be followed, instead of the obsolete or supplanted methods.

The cases of *McKane vs. Durston* and *Reetz vs. Michigan*, quoted in the Government's brief, were cases involving the question of what constituted "due process of law" under the Constitution, and the "privileges and immunities of citizens," protected by the constitutional guarantee of equality and enjoyment, and have no relevancy or application here.

## VI.

**There is no ground for the fears expressed by the Government with reference to the increase of business through interlocutory reviews.**

It is not contended here that every interlocutory decision is appealable. This one, founded upon a Constitutional right which is taken away, is alone appealable out of all those enumerated by our opponents. If the judgment of the court below is final, as contended, and the question raised is a Constitutional question, then, as has been heretofore remarked in this brief, the discussion of the increase of business is impertinent and irrelevant.

## VII.

**The case of Alexander vs. United States (201 U. S., 117), quoted by the Government in support of its contention under the seventh head of its brief, is in fact really an authority in favor of the contention of the Plaintiff in Error, for the opinion in that case said:**

> "Let the court go further and punish the witness for contempt of its order. Then arises a right of

review, and this is adequate for his protection without unduly impeding the progress of the case." (Page 121.)

This clearly recognizes that if, under the old Constitutional safeguard, the witness had refused to answer and the court had proceeded to administer the punishment for contempt, that this, although only an incident in the trial, would constitute a reviewable order, which could be carried up on writ of error without waiting for the end of the case.

Surely, if there is anything in analogy, this authority sustains the contention of the Plaintiff in Error, for, in his case, under the immunity, he is now exposed to that which is the substitute for punishment for contempt. The only legal consequence of overruling his plea is that he shall be prosecuted. This certainly creates a condition exactly similar to the witness who, having refused to testify, is about to be punished for contempt.

We do contend that because the order of the court below finally determines the question of immunity between Mr. Heike and the Government, it is therefore appealable, and this is the test clearly pointed out in the cases to which we have referred.

It is true that these cases are civil cases, but in this respect there is no difference between the rule of law that is applicable in a civil, and that which is applicable in a criminal, case.

## VIII.

## In Conclusion.

This is, indeed, a unique case, without precedent. Never before since the passage of these laws has there been a trial ending in such a ruling as the one made in this case in the court below. It is a case presenting fundamental and vitally important questions. By this proceeding and the hearing upon this writ it is hoped that this supreme tribunal, with that deliberation

and care for which it is distinguished, will settle the question finally, concerning the rights of a person who is dragged before a grand jury, court or other tribunal, deprived of his constitutional privilege under the Fifth Amendment, compelled to lay bare every question, fact and thing concerning which he may be examined in an Interstate Commerce or Anti-Trust proceeding; forced to appear without the aid or advice—and, indeed, relying upon the Nation's pledge of immunity, not seeking the aid or advice —of counsel, depending with full reliance upon the protection of the statute, yielding up, through books and documents, and orally, upon oath, any and all evidence upon the subject inquired about. The case is of grave importance, not only to the defendant, whose liberty is involved, but it is also vitally important with reference to the policy of the Government in the administration of the Sherman Anti-Trust Law and the Interstate Commerce Acts. It is important, in the maintenance of that policy, to remove all obstacles and hindrances to a full and complete inquiry into everything that may be necessary to carry into effect those important statutes.

The papers before the Court and the record disclose Constitutional questions within the right of this Court to review. They also disclose the entering of a judgment upon a collateral matter distinct from the general subject of the litigation, one which constitutes a final judgment that this Court has the right to review.

**In view of the novelty of the questions involved, and their grave character and importance, and the great need, now, for a settlement of them as a precedent and guide, and, above all other considerations, the necessity to fully maintain and carry out the Nation's pledge of immunity, in letter and spirit, and to secure to this plaintiff in error the full protection which these laws guaranteed to him in lieu of his constitutional privileges under the Fifth Amendment, it is respectfully submitted that the motion to dismiss should be denied, and that**

**this case should be ordered to take the usual course under the rules of this Court, so that the plaintiff in error may have the right which every other litigant enjoys of arguing orally the important questions involved.**

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